Notes on

DIGNITIES

IN THE

PEERAGE OF SCOTLAND

WHICH ARE

Dormant or which have been Forfeited.

BY

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LONDON:

WILDY AND SONS,

Law Booksellers and Publishers,

LINCOLN'S INN ARCHWAY, CAREY STREET, W.C.

EDINBURGH: BELL & BRADFUTE, 12, BANK STREET.

1882

LONDON:
PRINTED BY C. F. ROWORTH, BREAM'S BUILDINGS,
CHANCERY LANE.

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CORRECTION.

Page 70, line 2—*For* "Wedderburn" *read* "Marchmont."

INTRODUCTION.

THE limitations contained in Letters Patent or Charters creating Scottish Titles of Honour vary so much, and special destinations are so numerous, that few of the Dignities in the Peerage of Scotland which appear at the present time to be either dormant through non-claim, or to be suspended in consequence of attainders for High Treason, can be in truth extinct. It has, therefore, been thought that short accounts of such Dignities might prove interesting.

In England claims to Baronies in abeyance, created by Writ of Summons to and sitting in Parliament, which are descendible to heirs general, are not unfrequent, though necessarily limited in number: but claims to titles above the rank of a Barony, can for the most part only arise on questions of disputed succession, or, as in the Devon and Wiltes cases, upon the construction to be placed upon limitations in Letters Patent, other than to heirs male of the body, or upon the validity of the destinations of the Peerage as limited in the Letters Patent, as in the Buckhurst case, or upon the question whether the Letters Patent confer a right to a seat in the House of Lords, as in the Wensleydale case: but in Scotland, where any Peer may impeach the title of another at the election of Representative Peers, and where the destinations of Dignities are so various, and before the Union were so constantly altered on the application of the Peer in possession, the heirs, whether heirs male, of line or provision, substitute or general,

must of necessity be extremely numerous, and claims must consequently be frequent.

The doctrine of abeyance did not prevail in Scotland, and there are not any co-heirs or heirs portioners in relation to Scottish Peerages, a Dignity descendible to heirs of line descending, failing heirs male of line, to the eldest daughter or her representatives.

All Scottish Dignities were in their origin territorial, that is, incident to or dependent upon tenure: and they appear to have gone to heirs general in cases in which the lands were destined to such heirs. This conclusion is supported by the law as laid down on the claims to the Crown of Scotland, the Crown having been awarded to Baliol, the eldest co-heir, in 1292; on which occasion the Lords Auditors declared that the principle of non-partition between co-heirs, which governed the descent of the Crown, applied also to territorial Earldoms.

Cases of the descent of Peerages in the female line occur in the succession to the Herries Peerage, the Barony of Balfour of Burley, constituted by Letters Patent in 1607, the Barony of Saltoun, recognized by King Charles the Second in 1670, in the Sempill case in 1685, and in the Sutherland case in 1771; and, indeed, wherever the facts prove a descent to a female, or to the representative of a female, a destination to heirs of line has been held to exist.

After the Sovereigns of Scotland ceased to create Dignities purely territorial, Peerages were created either by inserting words of creation in Charters granting or erecting territorial Earldoms or Lordships, by investiture only, or by special Charters or Letters Patent, accompanied by a solemn inauguration by Belting or Cincturâ Gladii, analogous to feudal investiture. (Earl-

doms of Home and Perth in 1605, Wigtoun Earldom in 1606, Buccleuch Barony in 1606, and Douglas Marquisate in 1633.) Investitures were, however, afterwards dispensed with by special dispensations from the Crown.

Previously to the accession of King James the Sixth to the throne of England, the creation of Peers of Scotland merely by Letters Patent was rare; but towards the close of his reign, grants by Letters Patent became the ordinary mode of conferring Dignities in Scotland. The grants were sometimes accompanied by the ceremony of investiture, sometimes they were declared sufficient of themselves, and sometimes the ceremony of investiture was dispensed with by express words. Creations by Writs of Summons were unknown in Scotland, for as there was only one Chamber of Parliament there could be no separate House of Peers. Prior to 1582 all the Members of the Parliament, whether they sat as Spiritual or Temporal Lords of Parliament, or as Tenants in chief of the Crown (*a*), or as Commissioners of the Royal Burghs, were called by a general summons to attend; and special Writs of Summons to any of the Lords of Parliament, although occasionally issued, were rare, and the Lords of Parliament sat under their right as Lords of Parliament and not by virtue of the Writs which might have been directed to them.

Although the Letters Patent creating Dignities generally made destinations of the Peerage conferred by them, it was by the law of Scotland competent to the Grantee

(*a*) Although the Act of 1427 (Acts of the Parl. of Scot. V. 2, p. 15, No. 2) authorized the Lesser Barons or Tenants in Chief of the Crown to elect Commissioners, the Act does not appear to have been acted upon, and there are no returns of Commissioners previously to 1587 upon record. The Lesser Barons sat in person and not by Representatives when they attended Parliament until the Act of 1587 was passed. (Acts of the Parl. of Scot. V. 3, p. 509, No. 120.)

or any of his successors to resign such grant into the hands of the Crown for a new grant, limiting the title in such manner as the Grantee with the consent of the Sovereign might direct, or to such heirs as he might nominate thereafter, and the Patents granting the Dignities of Coupar, Braedalbane, Erroll, Roxburghe, Rutherford, Maderty, Stair and Cardross, are instances in which a power of nomination was given to the Grantee. A Peeress also might resign her title in favour of her eldest son, as was done by Ann Duchess of Hamilton in 1698. It was, however, necessary to have a valid act of resignation made to the Sovereign, the Sovereign's acceptance of it, and a re-grant by the Sovereign, and it was also necessary that the re-grant should state and proceed upon the resignation, a title by resignation being in reality a title by progress, and not a title proceeding from the mere will and gift of the Crown.

Instances occur where the re-grant did not follow until after the death of the Resigner. A re-grant, if it professed to follow upon the resignation, carried the original precedence, even although it was not mentioned, but usually the precedence was expressly granted.

The case of the Earldom of Stair, in 1748, involved the effect of a nomination to Honours made under the authority of a valid re-grant in 1707, anterior to the Union, when the nomination was made after the Union (*b*).

(*b*) The Printed Case for the Claimant James Dalrymple, who controverted the Nomination, a copy of which is in the possession of the Author, shows that he founded on the contention that as the Crown could not after the Union ratify the Nomination which had been made, the Nomination must be considered as null and void. It does not appear, however, that the House acted upon the views expressed in Mr. James Dalrymple's Case, although they decided in favour of his claim. Lord Loughborough in the Erroll case stated that if a power of nomination were given, the act of nomination did not require any ratification.

It was held that the nomination was invalid, as no alteration in the succession of a Peerage of Scotland could be made after the Union, and in consequence there was a separation for a time of the Stair Honours from the Stair estates. The Erroll claim (the judgment in which case is given in the Appendix) was allowed by the House of Lords in 1797, because the act of nomination had been made before the Union. There is, it is believed, no instance of a resignation to extinguish a Peerage, save in the case of the Earldom of Ross in 1476, and that resignation was a resignation of the Territorial Earldom of Ross, which carried the Dignity with it.

With regard to the descent of Scottish Dignities, it appears to be a rule of law, as decided in the cases of Cassillis in 1762, Spynie in 1785, and Glencairn in 1797, that where the origin of the Dignity is unknown, the presumption is that it was in its creation limited to the heirs male of the body of the Grantee; but though this is the rule, it was held in the Sutherland case in 1771 (*c*), and in the Herries case in 1858 that, as it was always in the power of the Sovereign to make an Honour descendible to females as well as to males, this general presumption must give way wherever there are circumstances sufficient to show that heirs of line as well as heirs male were included in the original destination.

In the Nairne case (the judgment in which claim will be found in the Appendix) the Claimant succeeded under a limitation to "the eldest daughter or heir female to be procreated between the parties named, successively without division," she claiming through a daughter of a son of those parties and in preference to the daughters of the parties to whom the Dignity was granted. The Claimant

(*c*) Notes of Lord Mansfield's speech in this claim are given in the Appendix.

was not in possession of the lands mentioned in the Charter. The words in the Letters Patent were, "To the heirs allenarly succeeding to the said Sir Robert Nairne, his lands and estate;" but the estate was forfeited and the Claimant was not seised of any part of it, yet she was, notwithstanding, held to be entitled to the Dignity. If such words could have affected a title to the Dignity before the Union, the Stair case appears to show that no power can exist in any person to alter or affect the course of the descent of a Peerage of Scotland as previously settled, by any act done after the Union.

In the Polwarth claim (the judgment of Lord Lyndhurst in which case will also be found in the Appendix) the limitation "To the said Patrick Home and the heirs male of his body lawfully begotten or to be begotten and the heirs of the said heir male," was held, upon failure of the heirs male, to entitle the heir of the body of the heir male to the Dignity.

It was the practice to restore dormant Dignities either by Charter, Letters Patent, or Royal Warrant. In 1629, the Dignity of Earl of Athol, created by King James the Second before 1457 was, by a Charter under the Great Seal, allowed and confirmed to John Murray, subsequently Earl of Tullibardine. In 1631 Letters Patent were passed which purported to admit the right of William Earl of Menteith to be Earl of Strathern, and to restore him to the dignity of Earl of Strathern granted by King Robert the Second to his son Prince David in 1371; but the Letters Patent were reduced and declared void by the Court of Session in an action of reduction in 1633, on the ground that the retour finding the Earl of Menteith to be heir of the Earl of Strathern was erroneous. This conclusion would appear to have been arrived at on political, more than on legal, grounds.

The Dignity of Lord Saltoun was created in 1445 with a destination, according to the statement made in the Warrant of 1670, to the Grantee and the heirs of his body; on the 11th of July 1670 King Charles the Second allowed and confirmed the dignity to Alexander Fraser, the senior heir of line, by a Royal Warrant which was confirmed by Parliament on the 22nd of August then following; and both King Charles the Second and King William the Third by Royal Warrants authorized the collateral heirs male of George Home Earl of Dunbar to assume and bear the title of Earl of Dunbar.

It is a principle of law that an Act of the Crown cannot be carried beyond its intendment, and these instances show that when the Sovereign meant to restore an ancient Honour, and not to create a new Dignity, a special instrument declaring the Royal pleasure was required; for an Act of the Crown, sufficient according to law to create a new Dignity, would not be sufficient to restore an ancient Honour, as it would not show any intention on the part of the Sovereign beyond the intention to create the Peerage as a new Dignity. From the time of King Henry the Third of England to the present time it has been the practice in England to confer new Dignities of the same names as more ancient titles which had failed; and a similar practice prevailed in Scotland from the time of King Robert the Bruce to that of King William the Third.

The loss of Honours by Attainder before the Union was absolute, without any saving qualifications by substitutions in the nature of remainders in Patents, grants or settlements, because in Scotland every person was held to have the absolute fee: the King alone, without the aid of Parliament, could, contrary to the law of

England, rehabilitate and restore the person. Treason, by the Act of 1587 (Acts of the Parliament of Scotland, V. 3, p. 451, No. 34), was even extended to certain thefts, an Act which continued in force down to the Union. After the Union the English law of High Treason was by Statute made the sole law of Treason for the whole of Great Britain, and this completely altered the law which had previously prevailed in Scotland. It confined treason to acts against the Crown, and saved from forfeiture inheritances which could be claimed under substitutions in the nature of remainders.

The principles governing the effect of an attainder upon the person in possession of or entitled to succeed to a title of Honour have been decided by the Sinclair case in 1782, the Athol case in 1764, and the Airlie case in 1812. The Sinclair case proceeded upon the ground that a person claiming under a substitution, which would according to the law of England have been a remainder, could take after the death of the Peer, who had been in possession under a prior substitution, notwithstanding the forfeiture of such Peer by an attainder for High Treason, following the decision in the case of Gordon of Park. (Craigie, Stewart & Paton, I. 558; Mor. 4737.) In the Athol case, it was held that if the attainted person died in the lifetime of the person in possession of the Dignity, the attainted person's son could take; and in the Airlie case, it was held that if the attainted person survived the person in possession of the Dignity, the Title was forfeited.

Honours are not specified in the Acts of Prescription and were not at any time affected by them; nor did the Prescription Acts affect the precedency of Dignities, although the point as to prescription was raised in the Sutherland and Crawford precedency case in 1706.

The short accounts which are subjoined of the Scottish Dignities, which are at present dormant or have been forfeited by attainders for High Treason, have been prepared from Douglas's Peerage and Baronage of Scotland and other Authors on Dignities, as well as from the Printed Cases and Minutes of Evidence upon claims to Peerages of Scotland. The Printed Cases, owing both to the able researches and valuable experience of those engaged professionally as advisers of the Claimants, (which have led to the discovery of many Public Records and of private muniments which were not previously known) and to the accurate and extensive learning of the Counsel engaged on such cases, contain reliable material not only in support of the titles of the respective Claimants, but also for establishing the law relating to the descent of, and right of succession to, Scottish Peerages generally, and the principles by which the descent of such Peerages are governed.

Although every care has been taken to ensure accuracy, it is impossible in a work like the present to avoid mistakes, and possibly omissions; but it is hoped that the publication of a list of the above-mentioned Dignities, imperfect and incomplete though it may be, may prove of interest, if not of utility, and may lead to the correction of some errors which can only be discovered by the aid of the Public Records, of Charters and documents in private custody, or other evidence of an unimpeachable character.

Several Dignities in the Peerage of Scotland, which were forfeited for adherence to the Stuart Family, have been restored by the grace and favour of the Crown; and it is understood that a similar grace and consideration would be extended to the Representatives of the Peers who were attainted, in cases in which the position of

such Representatives could justify an appeal to the Royal clemency and enable the Sovereign to extend it. In the earlier instances of restoration after the Union the Acts of Parliament directly restored the Honours which had been forfeited to the Representatives named in the Acts; but the later Acts of Parliament making restorations have only authorized and enabled the Representatives to make claim, and to establish their right to the Dignities which had been forfeited, notwithstanding the attainders for High Treason against their predecessors.

A curious question might arise, should a claim to the Dignity of Lord Forbes of Pitsligo be preferred on the ground that a substitution to distinct classes of heirs, heirs of line or heirs male whomsoever, saved the right of heirs of line or heirs male whomsoever from forfeiture by the attainder of Alexander Lord Forbes of Pitsligo in 1746, or should it be the pleasure of the Sovereign, without regard to such possible claims, to restore the Dignity to the person who would but for the attainder be lawfully entitled to it. The Title was granted to Alexander Forbes in 1633, the destination being to him and the heirs male of his body to be procreated, *or* (vel) to their heirs, whom failing to his heirs male whomsoever. The Honourable Charles John Robert Trefusis is the heir of the heir male of the body of the Grantee, and Sir Charles John Forbes of Newe Baronet appears to be the heir male collateral of the Grantee. The destination resembles to a great extent the destination in the Polwarth case, in which the House of Lords in 1835 decided in favour of the heir of line of the heir male of the body; but in the Polwarth case, the grant was to the heirs male of the body of the Grantee begotten or to be begotten *and* to the heirs of the said

heirs. The difference is in the words introducing the destination after the grant to the heirs male of the body. In the grant of the Honour of Forbes of Pitsligo, it is, *or* to the heirs of the heirs male of the body. In that of Polwarth, it is, *and* to the heirs of the heirs male of the body. In accordance with the decision in *Stewart* v. *Stewarts* (2 Sh. Rep. 149), the House of Lords held that the word "et" ought to be construed as equivalent to whom failing; but the question in reference to Forbes of Pitsligo must be, can a similar meaning be put upon the word "vel," and did the Crown intend to grant the Honour to the heirs male to be begotten of the Grantee and to their heirs, before calling in the collateral heirs male, or solely to the heirs male of the body of the Grantee or to their heirs of line, whichever might exist when the succession should open on the death of the Grantee (*d*).

Although the presumption in the law of Scotland is that if a Peerage be granted without writing or if the writing be lost, the descent is confined to the heirs male of the body of the Grantee; Lord Mansfield, in his Judgment in the Cassillis case, expressed an opinion that if on the creation of a Peerage the lands of the Grantee were erected into an Earldom or Lordship, the entail of the land in the Charter of erection would afford evidence of the destination of the Peerage. (Mr. Maidment's Report of the Cassillis case, page 48.) This might appear almost a necessary conclusion, as the erection of the lands into an Earldom or Lordship could be due only to the Dignity conferred. In order, however, to

(*d*) In wills and private writings the word "or" has been frequently read as equivalent to "and." (Jarman on Wills, ed. 1881, pages 505 to 517.) A case, however, has not been found in which the word "or" was so construed in Letters Patent or other Crown grants.

afford evidence of the entail of the Dignity, a contemporary entail of the newly-erected Lordship would be required,—as a re-grant of the lands to the Grantee, his heirs and assigns, would not give him a different or larger estate than he would have had without any destination, the law of Scotland holding that a grant of a heritable subject without words of limitation vests the subject in the Grantee, his heirs and assigns.

In consequence of the extended destinations and of the peculiar limitations of Scottish Peerages, as well as of the number of attainders against Peers of Scotland for adherence to the House of Stuart, a great number of claims have since the Union been brought before the House of Lords (*e*), and the following Peers of Scotland and Lady Nairne hold their Honours under decisions of the House, viz.:—The Dukes of Athol and Roxburghe; The Marquesses of Huntly and Queensberry; The Earls of Crawford, Mar and Kellie, Sutherland, Cassillis (Marquis of Ailsa in the United Kingdom), Caithness, Morton, Buchan, Perth and Melfort, Strathmore and Kinghorne, Lindsay, Loudoun, Southesk, Dalhousie, Dysart, Newburgh, Dundonald, Braedalbane, Aberdeen and Stair; Lords Borthwick, Saltoun, Herries, Lovat, Sinclair, Kinloss (Duke of Buckingham in the United Kingdom), Balfour of Burley, Colville of Culross, Dingwall (Earl Cowper of Great Britain), Napier, Fairfax, Belhaven and Stenton and Polwarth. The Earls of Wemyss, Airlie and Carnwath and Viscount Strathallan hold their Peerages under Acts of Parliament setting aside attainders against their Ancestors.

The seven original Earldoms of Scotland, which were

(*e*) Lists of Claims to Peerages of Scotland which have been referred to the House of Lords are given in the Appendix.

in their origin small Principalities, and the other Earldoms which throughout the time in which they existed may be presumed to have been territorial, are not separately noticed in this work, as, if the Dignities attached to or derived from such Earldoms depended upon the tenure of the lands constituting the Earldoms, the heirs of the former possessors, not having the lands, could not apparently have a right to the Dignities, and such Dignities could not be deemed dormant if a title to the lands could not be established. The seven original Earldoms of ancient Scotland were:—Angus, Athol, Caithness, Fife, Mar, Moray and Strathern, and the Earldoms of Buchan, Menteith and Ross appear to have also been originally Dignities by Tenure, and are said to have been dependent upon the original Earldoms of Mar, Strathern and Moray. The Mearns, which is said to have been a sub-lordship dependent upon Angus, and Forthreve, which is said to have been in like manner dependent upon Fife, do not appear to have given titles of Honour to Peers of Scotland. Gowerin, or Gowrie, also said to have been a sub-lordship dependent upon Athol, did not, so far as can be traced, give a title of Honour to a Lord of Parliament until King James the Sixth created William the fourth Lord Ruthven Earl of Gowrie in 1581. The Territorial Earldom of Angus, together with the Dignity, devolved upon Matildis Countess of Angus; and upon her death it descended to her son Gilbert de Umfraville, who was Earl of Angus in 1267. His grandson Gilbert, called the tenth Earl of Angus, adhered to King Edward the Third against the Scottish King, and was one of the disinherited Lords and lost all his possessions in Scotland. David de Strathbolgie, the eleventh Earl of Athol, and the possessor of the Territorial Earl-

dom, adhered to the Crown of England against King Robert the Bruce, and was one of the disinherited Lords and was deprived of all his possessions in Scotland. The original Earldom of Strathern appears to have been forfeited in the reign of King David the Second, and a new Dignity, with the title of Earl of Strathern, was created by King Robert the Second in favour of his younger son, Prince David, about the year 1371. The Earldom of Fife, with the Dignity, was, upon a Resignation, granted to Prince Robert, the third son of King Robert the Second, who was subsequently created Duke of Albany; and after the death of Isabel Countess of Fife, he bore, amongst his other styles, the title of Earl of Fife. His son Murdac Duke of Albany and Earl of Fife and Menteith, was convicted of High Treason and executed in 1425, and upon his conviction all his Dignities and possessions were forfeited. The House of Lords held in 1875, that the ancient Earldom of Mar had ceased to exist long before the accession of Queen Mary in 1542, and decided that the Dignity of Earl of Mar held by the Erskine family, was created by the Queen about the time of her marriage with Lord Darnley on the 29th of July 1565. The Territorial Earldom of Moray came to the Crown in the twelfth Century by the death, at the Battle of Strickathrow, of Angus Mormaor or Earl of Moray, and from the time of his death until King Robert the Bruce created Thomas Randolph Earl of Moray, about the year 1312, no one appears to have borne the title of Earl of Moray. The Territorial Earldom of Caithness, except the southern portion of the Earldom, which was subsequently erected into the Earldom of Sutherland, was at an early period conquered and held by the Danes, and after it was restored to Scotland the Earls of Caithness were not numbered amongst the

Seven Earls. The Dignity of Earl of Caithness, first granted after the Province had been recovered by the Kings of Scotland, appears to have determined towards the close of the thirteenth or the beginning of the fourteenth Century, and the title of Earl of Caithness subsequently granted was conferred as a Personal Honour.

The Dignity of Earl of Gowrie, held by the Ruthven Family, was created in 1581, and in the same year the lands and Barony of Gowrie, which previously to the dissolution of Monasteries in Scotland had been held by the Monastery of Scone, were granted to William Lord Ruthven. In the Charter which granted the lands it was recited that the Lordship of Gowrie had been granted by Lord Ruthven's ancestors to the Abbey of Scone. The Territorial Earldom of Menteith and the Dignity of Earl of Menteith were held by Gilchrist Earl of Menteith in the Reign of King William the First. Alan, who is stated to have been the seventh Earl of Menteith, supported the cause of Robert the Bruce. His granddaughter and heir Margaret married, as her fourth husband, Robert Stewart, a younger son of Robert Earl of Strathern, who succeeded as King Robert the Second in 1371, and Robert Stewart in her right succeeded to the Territorial Earldom of Menteith, and during the time of King David the Second was styled Lord (Dominus) of Menteith, but after his father succeeded as King of Scotland he became Earl of Menteith. Robert Earl of Menteith afterwards became also Earl of Fife and was created Duke of Albany. The lands and Dignity were forfeited by Murdac Duke of Albany, his son, in 1425. The Dignity of Earl of Menteith was granted in 1427 by King James the First to Malise Graham, after Malise had been deprived of the Earldom of Strathern. The Earldom

of Buchan descended through marriage to Henry, the first Lord Beaumont, who was several times summoned to the Parliament of England as Earl (Comes) of Boghan, or Buchan. He adhered to King Edward the Second against King Robert the Bruce, and, as one of the disinherited Lords, lost all his possessions in Scotland and ceased to be Earl of Buchan. His son was called to and sat in the Parliament of England as Lord Beaumont, and did not take the title of Earl of Buchan. The present Lord Beaumont is the senior co-heir of Henry Earl of Buchan and Lord Beaumont, and of Alice Countess of Buchan, his wife; and if the Dignity be not forfeited, and be descendible without regard to Tenure, he would be entitled to it. The Earldom of Ross devolved, through female descent, upon the MacDonalds, Lords of the Ysles, and was forfeited by John the eleventh Earl of Ross in 1476, who, upon his restoration by the King in Parliament, resigned the whole Earldom of Ross *ad remanentiam* to the King. The Earldom of Carrick appears to have been Territorial during the time that it was held as a separate Peerage of Scotland. Duncan was Earl of Carrick as a subject of the King of Scotland in the early part of the thirteenth Century, and his son Niel was Earl of Carrick in 1255. The landed Earldom, with the Dignity, descended to Margaret Countess of Carrick, and her husband Robert Bruce was Earl of Carrick in her right by the courtesy of Scotland. In 1292 Robert Bruce Earl of Carrick resigned the whole Earldom of Carrick into the hands of John Baliol, then King of Scotland, in order that it might, on his resignation, be granted to his son Robert; and King John having acted upon the resignation, Robert the son became Earl of Carrick, and the father ceased to be an

Earl. Robert, who became Earl of Carrick in consequence of the resignation, was the celebrated Robert the Bruce, and on his accession to the throne the title merged in the Crown. The Dignity of Carrick was subsequently granted to Princes of the Royal Family, and eventually it was held to be a Dignity vested under the provisions of the Act of Parliament of 1469 in the Eldest Son and Heir Apparent of the Sovereign. The Dignity of Earl of March appears to have been Territorial during the time in which it was held as a Dignity in Scotland. It was forfeited by George the eleventh Earl of Dunbar and the then Earl of March, and the forfeiture was confirmed by the Parliament of Scotland on the 10th of January 1434—35. The Honour of Earl of Lennox appears to have been originally Territorial, and as a Dignity by Tenure to have descended to Duncan, the eighth Earl, who was beheaded upon a charge of High Treason on the 25th of May 1425. He left issue three daughters, and the estates which had been held by the Earl were, upon a partition, allotted between them. The issue of the Lady Isabel, the eldest, the wife of Murdac Duke of Albany, failed either in her lifetime or shortly after her decease in or about the year 1460. Margaret, who is stated to have been the second daughter, married Robert Menteith of Rusky, and there are at present descendants from Margaret in existence; but she and her heirs held only a portion of the Earldom of Lennox, and none of them ever held the Dignity of Earl of Lennox. On the contrary, the title of Earl of Lennox was, from 1473 until 1571, held by the Family of Stuart, Lords of Derneley, the heirs and representatives of Elizabeth, who is stated by some to have been the third daughter of Earl Duncan; although, on the other hand, the Stuarts alleged that she was the second

daughter, and senior to Margaret. As, however, the Territorial Earldom was broken up upon the partition between the daughters of Earl Duncan, the Dignity held by the Stuarts, Earls of Lennox, would appear to have been a personal Honour. Matthew, the fourth Earl of Lennox, of the House of Stuart, died on the 4th of September 1571, and his grandson, King James the Sixth, was his heir male and heir of line; and on the death of Earl Matthew the Dignity of Earl of Lennox, held by the principal line of the Stuarts, determined. The title of Earl of Lennox, as a personal Honour, was subsequently granted to other Members of the Family of Stuart.

Although there are many dormant Peerages in Scotland, there appear to be very few in England, save Baronies in abeyance. The title of Earl of Huntingdon, created by King Edward the Fourth in 1479, is apparently vested *de jure* in the Duke of Beaufort, and the title of Lord Latimer, under the Writ of Summons of the 29th of December 1299, in Lord Willoughby de Broke, but neither Dignity has been claimed. Lord de Lisle and Dudley would appear to have a right to the Dignity of Lord L'Isle of Kingston L'Isle under the Letters Patent of the 26th of July 1444, if he were seised of the Manor of Kingston L'Isle. There may also be cases in which an abeyance may have determined without any claim having in consequence been made, and there may be heirs entitled to some of the ancient Dignities not now borne, although claims to them have not been brought forward.

There do not appear to be many dormant Dignities in the Peerage of Ireland. But few Dignities in the Peerage in that Kingdom were created before the Accession of King James the First. Only twenty-six Temporal Peers

were called to Queen Elizabeth's Parliament held in 1585, and the Spiritual Peers called to the same Parliament were four Archbishops and twenty-two Bishops; and previously to the dissolution of Monasteries, the Spiritual Lords outnumbered the Temporal Peers (*f*).

The grant of the Dignity of Earl of Ormond by King Henry the Eighth in 1529 is peculiar. By the same Letters Patent Sir Thomas Boleyn was created Earl of Wiltes in England, to hold to him and the heirs male of his body, and Earl of Ormond in Ireland, to hold to him and his heirs. In case the decision of the House of Lords of the 2nd July 1811 against the claim of the late Earl Fitzhardinge to be the son and heir of the fifth Earl of Berkeley should be maintained, Louisa Mary, the only child of the late Honourable Craven Berkeley and now the wife of Major-General Milman, will on the death without issue of the Honourable Moreton Fitzhardinge Berkeley, become the heir of Sir Thomas Boleyn and apparently under the terms of the Letters Patent of creation will be entitled to the Dignity of Countess of Ormond. If the Dignity of Lord Berkeley held by the

(*f*) The title of Earl of Carrick, a Dignity supposed to have been created on the 1st of September 1315, has been occasionally attributed to the later Earls of Ormonde of the House of Butler, but it may be well doubted if the creation of that Honour were ever completed, as the Title does not appear to have been borne by the Grantee or by his son, and the son, by the description of James Butler of Ireland, was created Earl of Ormonde in 1328. Probably Edmund Butler, the Grantee named in the Charter of 1315 was not invested in the Dignity by the usual ceremony, a form at that period considered essential. If, however, the title of Earl of Carrick were validly created in 1315, it would be vested in the co-heirs of Thomas, the seventh Earl of Ormonde, who died in 1515, and not in the Marquess of Ormonde, who is the heir male, as the limitation was to the heirs, and not to the heirs male, of Edmund Butler. The Title of Earl of Ormonde was settled by Act of Parliament in the 33rd of King Henry the Eighth upon the heirs male of the then Earl of Ormonde.

Earls of Berkeley and their predecessors, the Barons of Berkeley, were created by Writ of Summons to Parliament, Mrs. Milman will also become entitled to the Honour of Baroness of Berkeley, should her uncle die without issue. In 1628 King Charles the First by the same Letters Patent created the then Earl of Clanrickarde, Earl of St. Albans in England, to hold to him and the heirs male of his body, and Viscount Galway in Ireland, to hold to him and the heirs male of the body of his father; but neither the Dignity of Viscount Galway, nor that of Viscount Bourke of Clanmorris, created in 1629, are borne by the Marquess of Clanrickarde, although they are both *de jure* vested in him. Montague Peregrine Earl of Lindsey appears to be entitled to the Dignity of Viscount Cullen in Ireland, and it is probable that there are heirs who may be entitled to the Dignity of Lord Athenry, the Premier Barony of Ireland, and that there are also heirs who may be entitled to the Dignity of Lord Trimleston, a Peerage created immediately after the accession of King Edward the Fourth; and there are other Peerages of Ireland to which claims might be preferred (*g*). There are also some forfeited Peerages of England, and several forfeited Peerages of Ireland to which the heirs of the former possessors of the Dignities would be entitled if their succession to the Honours were not barred by Attainders. To many of the more ancient Earldoms of England under attainder no claim of right could be made, as if the attainders were not in force, the Dignities having

(*g*) Claims have from time to time been made to the Dignity of Lord le Poer of Curraghmore, created by King Henry the Eighth in 1535, and it is understood that there is a pending claim to that Honour; and claims have been advanced to the Dignity of Viscount Baltinglass and to other Peerages of Ireland, the Claimants sometimes seeking also reversal of the attainders affecting the Honours.

been descendible to heirs of line would be in abeyance. The Dignities of Duke of Ormonde, Earl of Derwentwater and Lord Widdrington, forfeited for adherence to the Stuart Family, would be extinct if they had not been forfeited, and several other Honours forfeited since the accession of King Edward the Fourth would also be extinct if unaffected by the Attainders. The Dignity of Marquess of Dorset, forfeited by the attainder of the Duke of Suffolk in 1554, would, if not forfeited, be vested in the Earl of Stamford and Warrington. The Dignity of Duke of Monmouth, forfeited in 1685, if not forfeited, would be vested in the Duke of Buccleuch, and the Dignity of Duke of Berwick, forfeited in 1695, if not forfeited, would be vested in the Duke of Alva, a Grandee of the First Class in Spain; and if the Outlawries of 1570-71 against Charles Earl of Westmorland were reversed, the Marquess of Abergavenny would be Earl of Westmorland. Most of the Peerages of Ireland supposed to be under attainder were attainted solely by Outlawries pronounced in absence, and notwithstanding the provisions made in the Act of the 9th of William the Third, Chap. 5, and seemingly in contravention of them, the Dignities of Earl of Fingall, Viscount Gormanston, Lord Trimleston, Lord Dunsany, Lord Dunboyne and Lord Louth have been restored by the reversal of the Outlawries in the Court of King's Bench in Ireland; but on a claim to the Dignity of Viscount Galmoy in 1828, the Law Officers of Ireland reported to the King that in their opinion under the provisions of the Act of the 9th of William the Third, Chap. 5, the restoration of a forfeited Peerage of Ireland could be effected solely by an Act of Parliament. The Duke of Wharton in England was attainted by Outlawry in 1729, and the Barony of Wharton, which

was vested in him at the time of his attainder, was held to be restored by a reversal of the Outlawry in the Court of Queen's Bench in England; but the Act of the 9th of William the Third did not apply to England. Before the Act of Queen Anne assimilated the law of Treason in Scotland to that of force in England, forfeited Peerages of Scotland might be restored by the act of the Sovereign without the intervention of Parliament. Since the Union, Peerages of Scotland which were under Attainder were until recently restored by Statutes which declared the Peerage to be thereby restored, but the later course in granting Acts of Restoration has been to enact that the person seeking the restoration should be enabled to establish his right notwithstanding the Attainder, and in as ample a manner as if the Attainder had never been of force.

In conclusion, it may be stated that it has not been thought necessary to mention in these Notes those Dignities which are known or believed to be extinct, or the titles of Marquess of Annandale, Earl of Annandale and Hartfell, Viscount Annan, Lord Johnstone of Lochwood, Lochmaben, Moffatdale and Evandale, which became dormant on the death of George the last Marquess of Annandale in 1792, and to which claims have since been made from time to time, as the claims of Sir Frederic Johnstone, as heir male collateral of the last Marquess, of Mr. Hope Johnstone as heir-female of the body of James Earl of Hartfell created Earl of Annandale in 1661, and of Mr. Edward Johnstone as heir male general, have so recently been heard before the Committee for Privileges.

2 Raymond Buildings, Grays Inn,
August, 1882.

DIGNITIES IN THE PEERAGE OF SCOTLAND WHICH ARE DORMANT.

THE TITLE OF LORD ASTON OF FORFAR.

Sir Walter Aston of Heywood and Tixall in Staffordshire, a descendant of the English family of Aston of Heywood, was created Lord Aston, Baron of Forfar, to hold to him and his heirs male bearing the name and

arms of Aston by Letters Patent dated on the 28th of November 1627.

The Title of Aston is not inserted in the Return made by the Lords of Session to the House of Lords in 1740, although it was certainly then an existing Peerage.

The issue male of the body of the Grantee failed on the death of the fifth Lord Aston in 1751. The Title was afterwards assumed by Walter Aston, as the collateral heir male of the Lords Aston, and by Walter's son, but neither of them took any effectual steps to establish his right to the Peerage: a petition was, however, presented to the King in February 1816, by the Reverend Walter Hutchinson Aston, the son claiming the Dignity as a descendant of William Aston of Milwich, the fourth son of Sir Walter Aston, the grandfather of the first Lord. (House of Lords Journ. V. 50, p. 440.) The family was entirely an English family, and the main branch adhered to the Roman Catholic Faith, and were therefore incapable of sitting in the Parliament of Scotland. Although no person has assumed the Title since the death of Walter Hutchinson Aston in 1845, it appears highly improbable that the Dignity can be extinct, as the family was very numerous in Staffordshire, and several of the ancestors of the first Lord left younger sons. The Astons of Whorcross in Staffordshire were descended from Richard Aston of Whorcross, a younger brother of Sir John Aston, the great-great-grandfather of the first Lord Aston, and if there be not a nearer branch, the male representative of the Whorcross line would now be the heir male of the Aston family.

THE TITLE OF LORD BANFF.

Sir George Ogilvy of Dunlugus was created Lord Banff, to hold to him and his heirs male bearing the name and arms of Ogilvy by Letters Patent dated on the 31st of August 1642.

He was descended from Sir Walter Ogilvy of Dunlugus, the second son of Sir Walter Ogilvy of Boyne, who was the second son of Sir Walter Ogilvy of Auchleven, the second son of Sir Walter Ogilvy of Lintrathen, High Treasurer of Scotland, who died in 1440, and whose eldest son was the ancestor of the Lords Ogilvy, subsequently Earls of Airlie.

The Title became dormant on the death of William the eighth Lord Banff in 1803, and there can be no doubt that there are collateral heirs male of the Grantee.

Sir George Ogilvy of Dunlugus, the grandfather of the first Lord Banff, had two younger sons, and there may be descendants in existence from one of them. Sir George had also a brother, Walter of Carnousie, who may have left male issue, and Sir George's grandfather Sir Walter Ogilvy of Boyne had, besides Sir Walter, his second son, the ancestor of the Lords Banff, an elder son, George Ogilvy of Boyne, who married and left issue, and was the ancestor of the Ogilvys of Boyne, Rothemay and Inchmartine, and a third son, Sir William Ogilvy of Strathern, who married and left issue. In June 1812, and again in June 1819, Sir William Ogilvy of Boyne, as the descendant of George Ogilvy of Boyne, the eldest son, petitioned the King for the Dignity of Banff (H. of L. Journ. V. 48, p. 920; V. 52, p. 790);

but no proceedings appear to have been taken upon the claim. If all male issue from Sir Walter Ogilvy of Auchleven, the ancestor of the Earls of Findlater and of the Lords Banff, be extinct, the Peerage of Banff would appear to be *de jure* vested in the Earl of Airlie, the heir male of the body of Sir Walter's elder brother, Sir John Ogilvy of Lintrathen.

THE TITLE OF LORD BARGENY.

Sir John Hamilton of Carridden, the son of Sir John Hamilton of Letrick, a natural son of John, the first Marquis of Hamilton, was created in 1639 Lord Bargeny; but the limitation and precise date of the creation are not known, though Nisbet (Her. I. 394) assigns the probable date as the 14th of November 1641.

James, the fourth Lord Bargeny, died unmarried in 1736, and the Lords of Session, in their Return to the House of Peers in 1740, observe that the Patent has not been met with in the records; and by proceedings in the Court of Session, and (by appeal) before the House of Lords in 1739, touching the succession to the Bargeny estates, it appeared that there was at that time no heir male existing of the body of John Lord Bargeny the Settler of those estates in 1688, and no person had claimed a vote in respect of the Peerage since the death of the last Lord; but they did not know whether the Title was extinct or not.

If there be an heir male entitled to this Peerage, it is probable that he may be a descendant of William, the

second son of the first Lord, who married on the 3rd of April 1662, Mary, the daughter of Sir Patrick Hay of Pitfour, and the relict of Butler of Clashbeny, but no person has up to the present time made a claim under such descent.

THE TITLE OF LORD BELLENDEN.

Sir William Bellenden of Broughton Knight, was created Lord Bellenden of Broughton by Letters Patent dated on the 10th of June 1661, to hold to him and the heirs male of his body. The Title was resigned by him in favour of John Ker, the fourth son of William, the second Earl of Roxburghe, and his heirs of entail, on the 14th of April 1671; and the Crown re-granted the Dignity in the terms of the Resignation by Royal Charter dated on the 12th of December 1673, and John Ker, who assumed the surname of Bellenden, became the second Lord Bellenden. The particulars of the entail ratified by the Charter, and on which it proceeded, have not been ascertained; but if, on failure of the heirs male, it extended to heirs female, there are now heirs entitled to take the Honours re-granted by the Charter.

William, the seventh Lord Bellenden, the son of William Bellenden, the third son of John, the second Lord Bellenden, became the fourth Duke of Roxburghe, and died in 1805 without issue, when the title of Bellenden became dormant or extinct.

The titles of Duke and Earl of Roxburghe and other titles, except the Barony of Roxburghe and the Barony of Bellenden, which Dignity was not claimed, were by the

House of Lords in 1812 adjudged to Sir James Norcliffe Innes Ker under the terms of a Charter following upon a Resignation of those Honours.

The representation of this Peerage must, according to the limitations under the Resignation, be looked for among the heirs of entail, if any such exist, of John, the second Lord Bellenden.

THE TITLE OF LORD BOTHWELL OF HOLYROODHOUSE.

John Bothwell, the eldest son of Adam Bothwell Bishop of Orkney, who exchanged the greater part of the lands of his See for the Abbey of Holyroodhouse, was created Lord Bothwell of Holyroodhouse, to hold to him and the heirs male of his body; whom failing, to the heirs male of Adam Bishop of Orkney, his father; whom failing, to his heirs and assigns whomsoever, by Charter dated on the 20th of December 1607. This Charter also erected the Abbey lands into a Temporal Lordship and Barony. John Bothwell's son and heir died without issue, since which time the Title has not been acknowledged. William, the third son of Bishop Adam, left issue, and his great-great-grandson, Henry Bothwell of Glencorse, was served heir to John Lord Holyroodhouse, on the 8th of February 1734, and he presented a petition to the King claiming the Dignity; but, although the petition was referred to the House of Lords, no proceedings were taken upon it.

Henry Bothwell married Mary, the daughter of Lord Niel Campbell of Ardmaddie, the second son of Archibald,

Marquess of Argyle, by whom he had issue five sons and four daughters. He died on the 10th of February 1755. His four elder sons are stated to have died without issue; the youngest son, Robert (who settled in Jamaica), had an only daughter Margaret Bothwell, the heiress of Glencorse, who married Colin Drummond, M.D., a younger son of George Drummond, Provost of Dundee. She died in 1792, leaving issue Margaret, who married her cousin Andrew Drummond, the son of Archibald Drummond, M.D., of Bristol, and two sons, Archibald Bothwell of Glencorse, an officer in the Scots Greys, who died in London in January 1809, apparently without issue, and George, who appears also to have died without issue.

Henry Bothwell, who claimed the Peerage of Holyroodhouse, had four daughters, two of whom, Eleanora and Anne, died unmarried. Vere, the eldest, married Francis Wauchope of Kekmure, and Mary, the third daughter, married John Menzies, a Surgeon at Perth. The Dignity of Lord Holyroodhouse cannot be extinct, although it has been so long dormant, as if the issue male of the Bishop of Orkney be extinct, it must be vested in the heir of John Bothwell, created Lord Holyroodhouse, whether such heir can be traced from Margaret, who married Colin Drummond, or from one or other of the married daughters of Henry Bothwell, who claimed the Peerage in 1734.

THE TITLE OF LORD CARLYLE.

This Dignity was conferred between 1471 and 1476 on Sir John Carlyle of Torthorwald, who appears to have been a Commoner in 1471, but who sat in Parliament as a Lord of Parliament on the 1st of July 1476. (Acts of the Parliament of Scotland, V. 2, pp. 102, 113).

The Dignity descended in the male line, the heirs male having been also the heirs of line of the first Lord Carlyle, until the death of Michael, the fourth Lord Carlyle, previously to the 4th of March 1580-81; and it was then assumed by his granddaughter and heir of line, Elizabeth Carlyle, who married Sir James Douglas, and who in her right bore the title of Lord Torthorrell. It appears from the evidence given in the Annandale claim that she and her husband were living in 1601, and that both of them died before 1611, and that she was succeeded by her son, James Douglas, who bore the title of Lord Torthorrell, Torthorrell having been the principal Lordship of the Lords Carlyle and their Barony. If Lady Elizabeth lawfully assumed the Dignity, the presumption in favour of the issue male of the first Lord Carlyle is rebutted by the descent of the Carlyle Peerage, and the heir of Lady Elizabeth is entitled to the Honour. If the Peerage be descendible in the male line, issue male from Michael Carlyle; the second son of Michael the fourth Lord Carlyle, and the younger brother of William, Master of Carlyle, the father of Elizabeth, Lady Carlyle, was apparently in existence in 1770, and is probably now in existence; and there appear to be several other descendants of the family in the male line. The Lord Carlyle appeared before the Commissioners for

ranking the Peers of Scotland in 1606, and the Lord Carlyle who appeared must have been the son of Elizabeth Lady Carlyle, as Michael Lord Carlyle, her grandfather, died before 1580, and as her uncle, Michael Carlyle, the heir male, never assumed the Title. The Lord Carlyle, who appeared, was allowed the place which the Commissioners held to be that of the former Lords Carlyle, and was ranked between Lord Cathcart and Lord Sanquhar.

THE TITLE OF LORD CRANSTOUN.

By Letters Patent, dated on the 17th of November 1609, Sir William Cranstoun was created Lord Cranstoun, to hold to him and his heirs male bearing the name and arms of Cranstoun.

This Title became dormant on the death of Charles Frederick, the eleventh Lord Cranstoun, who died unmarried in 1869, and it has not been ascertained who is now his nearest heir male.

The ancient family of Cranstoun assumed the name from the lands of Cranstoun, in the Counties of Edinburgh and Roxburgh, in the twelfth century.

William de Cranstoun, Dominus Cranstoun, sat as a tenant in chief, or one of the Lesser Barons, in Parliament on the 18th of March 1481-82, but he was not a Lord of Parliament. His male line failed in the person of his great-grandson John, who died at the end of the sixteenth century, leaving an only daughter Sarah, who married William Cranstoun, created Lord Cranstoun in 1609.

William the fifth Lord Cranstoun, who died in 1727, appears to have had a son, George, who died in 1788, leaving male issue, and the first Lord also left two other sons besides his son John, the second Lord, and James, the father of the third Lord.

Whoever may now be the heir male of the family is entitled to the Dignity of Lord Cranstoun.

THE TITLE OF LORD DUFFUS.

The Sutherlands of Duffus derived their descent from Nicholas Sutherland, the second son of Kenneth, the third Earl of Sutherland.

Alexander Sutherland, the ninth in descent from Nicholas, was created Lord Duffus by Letters Patent dated on the 8th of December 1650; but the Letters Patent were not recorded, nor have they been traced amongst the family or other muniments.

Kenneth, the third Lord Duffus, the grandson of Alexander, was charged with High Treason, and was included in the Act of Attainder of the 1st George the First, passed in 1715.

The Act required that the persons named in it should deliver themselves up to justice on or before the 30th of June 1716, in order to avoid the Attainder for High Treason conditionally enacted against them. Kenneth Lord Duffus, was in Sweden at the time the Act passed, and he left Stockholm on the 2nd of June in order to deliver himself up, and he surrendered himself to the King's Minister, Sir Cyril Wych, on the 29th of June; but, owing to stress of weather, the vessel in which he

sailed as a Prisoner did not reach England by the 30th. He died early in 1734. His only son, Eric Sutherland, immediately claimed the Peerage on the ground that his father's surrender to the King's Minister at Amsterdam on the 29th of June 1716, avoided an Attainder under the Act. Eric's petition was referred to the House of Lords, and the claim was heard on the 3rd of April 1734, before the Lords Committee for Privileges. The Lords Committee called in the Judges, and the point as to the Surrender was argued on the 4th of April; and the Judges having given an opinion that the surrender at Amsterdam was not a performance of the condition required by the Act of Parliament, the Lords Committee resolved that Eric Sutherland, the Petitioner, had not a right to the Honour, Title and Dignity of Lord Duffus. Eric Sutherland died in 1768, and his son James, who was born in 1747, was restored to the Peerage of Duffus by an Act of Parliament which received the Royal Assent on the 26th of May 1826. The Act restored James Sutherland, and all other persons who would be entitled to succeed after him, to the Honours, Dignities and Titles of Lord Duffus, as if the said Act (the Act of Attainder) had never been made. Lord Duffus died unmarried on the 30th of January 1827. Lord Duffus' father, Eric Sutherland, had three daughters, the eldest of whom, Elizabeth, married the Reverend James Rudd, and her son, the Reverend Eric Rudd, alleged a right to the Peerage of Duffus upon the death of his Uncle, the restored Lord, but took no proceedings to establish his claim; nor is it known on what grounds he sought to exempt the Peerage of Duffus from the principle of Law governing the descent of Scottish Dignities when the Instrument of creation does not exist or the contents of it are unknown.

Eric Sutherland was, as stated above, the only son of the third Lord Duffus. James the second Lord, had three younger sons—James, William and John. William was attainted in 1715, and subsequently died without issue. James married Elizabeth, the daughter and heir of Sir William Dunbar, and in her right he succeeded to the estate of Hempriggs. He assumed the surname of Dunbar, and was created a Baronet in 1706. Sir William Dunbar, the only surviving son of Sir James, died in 1792, leaving by his third wife a son and successor, who on his father's death became Sir Benjamin Dunbar. Sir Benjamin was born in 1761, and having survived his kinsman, the restored Lord Duffus, he became on his death the heir male of the body of the first Lord Duffus; and if the Peerage were descendible in conformity with the principle of descent held to govern Scotch Peerages when the act of creation is not known, he then became also *de jure* Lord Duffus.

He presented a petition to the Queen in June 1838, claiming the Dignity of Lord Duffus as descended from James Sutherland, the second son of James, the second Lord Duffus, and his petition was referred to the House of Lords, but he did not take any steps to prosecute his claim. (H. of L. Journ. V. 70, p. 396.) He died in 1843, when he was succeeded by his only son, Sir George Dunbar.

Beyond presenting a petition to the Queen in June 1844, in terms similar to that presented by his father, (H. of L. Journ. V. 76, p. 424), Sir George took no steps to establish his right to the Dignity, and died unmarried in 1875, since which year the Title has been dormant. If it were descendible solely in the male line, it would be extinct, if there be no issue male

from the youngest son of the second Lord, and if the second Lord were the only son of the first Lord. If the Peerage be descendible to heirs general, the Reverend Mr. Rudd is the heir of line and entitled to it.

THE TITLES OF EARL OF DUNBAR AND LORD HOME OF BERWICK.

George Home was by Letters Patent, which passed under the Great Seal of England on the 7th of July 1604, and which were also directed to pass under the Great Seal of Scotland (*a*), created Baron Home of Barwick or Berwick, to hold to him and his heirs for ever, with full power and authority to nominate and appoint by any writing under his hand, even on death-bed, any kinsman or relation of his family, to have and hold the same Dignity to him and his heirs. On the 3rd of July 1605, he was created Earl of Dunbar, to hold to him and his heirs male.

(*a*) There appears to have been much uncertainty after the accession of King James the Sixth of Scotland to the Throne of England, as to the manner in which Peerages of Scotland should be created. These Letters Patent, and the Letters Patent creating Lord Kinloss, Lord Bruce of Kinloss, dated in the same year, were directed to pass under the Great Seals of the two Kingdoms, and they are the only instances of Grants made in such a form. Subsequently, Dignities were conferred under Commissions addressed to the great Officers of State in Scotland, commanding them to inaugurate or invest the Grantees with the Honour to be conferred, and subsequently, towards the close of the reign of King James, by ordinary Charters or Letters Patent passed in pursuance of Warrants signed by *the King himself* in England, or wherever he might be.

The Earl never made any appointment, and the Title of Lord Home of Berwick would appear under the terms of the Grant to be vested in his heir at law, and that of Earl of Dunbar in his heir male.

On his death in 1611 without male issue, the Titles became dormant, and in 1776 John Home of the Wedderburn branch was retoured heir male of the Earl of Dunbar; but the service was reduced by the Court of Session at the instance of Sir George Home of Blackader, descended from John Home of Blackader, the fourth son of Sir David Home of Wedderburn and the immediate younger brother of Alexander Home (the first) of Manderston, and therefore preferable by the law of Scotland to the descendants of the elder brother of Alexander. Alexander (the first) of Manderston had issue besides Alexander, the father of the Earl, a son Patrick Home of Renton, the ancestor of the Homes of Coldingham, whose male line terminated in 1785.

In 1651 King Charles the Second acknowledged and admitted the right of Sir George Home, the son of Alexander Home of Manderston, the brother to George Earl of Dunbar, and, in case he should die without issue male, the right of Sir Alexander Home, a Gentleman of the Privy Chamber, to hold and bear the Dignity of Earl of Dunbar; and the said Sir George and Sir Alexander having died without issue, King William and Queen Mary by their Royal Warrant dated on the 14th of October 1689, acknowledged and admitted the right of Alexander Home of Manderston, a Captain in a troop of horse in the service of the States of Holland, to hold and bear the title of Earl of Dunbar as the nephew and heir male of Sir Alexander Home, whose right to the Dignity had been admitted

by King Charles the Second, in case Sir George should die without issue male. The right of the Manderston branch to the Dignity consequently appears to have been admitted by two Sovereigns. Whether there be any male issue from Captain Alexander Home has not been ascertained. The Title, however, cannot be extinct, as there are certainly heirs male collateral of the first Earl in existence.

THE TITLES OF VISCOUNT OF DUNBAR AND LORD CONSTABLE.

Sir Henry Constable of Burton and Halsham, a descendant of a family who came to England with the Conqueror, and settled in Holderness in Yorkshire, was created Viscount of Dunbar and Lord Constable by Letters Patent, dated on the 14th of November 1620, to hold to him and his heirs male bearing the name and arms of Constable.

On the death of William, the fourth Viscount, shortly after the year 1714, the Titles became dormant, and no heir male has as yet made a claim to them.

Joseph Constable of Upsal, the Uncle of the first Viscount, left a son, John Constable; and if there be issue male from the said John, his eldest male descendant is entitled to the Dignities. John Constable of Halsham and Burton, the great-grandfather of the first Viscount, had two younger sons—Ralph Constable of Burstnic Northpark, and Christopher of Westead, both of whom married and left issue; and Sir John of Halsham, the father of the last-named John, had five younger sons, of

whom the three elder lived to full age, and Robert, the third of the younger sons, was the ancestor of the Constables of Bentley and of other families of Constables. The family of Constable is still numerous in the north of England, and it is extremely improbable that the collateral heirs male of the first Viscount can be extinct.

THE TITLES OF EARL OF DUNDEE, VISCOUNT OF DUDHOPE AND LORD SCRIMGEOUR AND INNER KEITHING.

Sir John Scrimgeour of Dudhope, the descendant of Alexander Scrimgeour, who received in 1298 a grant of the Office of Constable of Dundee, was created by Letters Patent, dated on the 15th of November 1641, Viscount of Dudhope and Lord Scrimgeour, to hold to him and the heirs male of his body, whom failing, to his heirs male whomsoever. His grandson, the third Viscount, was created Earl of Dundee, Viscount of Dudhope and Lord Scrimgeour and Inner Keithing in 1661; but as the Letters Patent were not recorded, the limitations are not known.

The Earl died without issue in 1668, and the family of Scrimgeour of Kirkton, who traced their descent from Sir John Scrimgeour, Constable of Dundee, who died some time after 1444, appear to have been the nearest collateral heirs male of the Dundee family, and they are said to have been heirs of Entail under Settlements dated in 1541 and 1587.

The Dignity of Earl of Dundee probably became extinct in 1668, but the titles of Viscount of Dudhope

and Lord Scrimgeour under the Letters Patent of 1641, appear to be *de jure* vested in the heir male of the family of Scrimgeour of Kirkton, if there be not a nearer heir male; but no claim to the Honours has been prosecuted since the death of the Earl of Dundee in 1668.

THE TITLES OF EARL OF FINDLATER AND LORD OGILVY OF DESKFORD.

James Ogilvy, the second Lord Ogilvy of Deskford, whose father, Sir Walter Ogilvy, was created Lord Ogilvy of Deskford by Letters Patent dated on the 4th of October 1616, was created Earl of Findlater by Letters Patent dated on the 20th of February 1638, to hold to him and the heirs male of his body lawfully begotten succeeding him in the patrimony and estate of Findlater and Deskford. By further Letters Patent dated on the 18th of October 1641, the Honours were re-granted and made descendible to Sir Patrick Ogilvy of Inchmartin, the son-in-law of the first Earl of Findlater, and his heirs male.

The male issue of Patrick, who became the second Earl in 1661, failed in the person of James, the seventh Earl of Findlater and the fourth Earl of Seafield, who died without issue at Dresden on the 5th of October 1811. He was succeeded in the titles of Earl of Seafield, Viscount Reidhaven and Lord Ogilvy of Deskford and Cullen (created by Letters Patent dated on the 24th of June 1701) by Sir Lewis Grant, the grandson of the Lady Margaret, the wife of Sir Ludovick Grant and the

elder daughter of James, the fifth Earl of Findlater and the second Earl of Seafield.

Sir Patrick Ogilvy, who, under the destination contained in the Regrant of the 18th of October 1641, became the second Earl of Findlater in 1661, was descended from Sir Walter Ogilvy, who obtained a portion of the lands of Inchmartin by marriage in the reign of King Robert the Third; and the heir male of Sir Walter, if there be an heir male in existence, would be entitled to the Dignities re-granted by the Letters Patent of the 18th of October 1641. Patrick Ogilvy of Inchmartin, the grandfather of Sir Patrick, who became Earl of Findlater in 1661, had a younger son William Ogilvy, and Patrick Ogilvy, the grandfather of Patrick, had two younger sons, Andrew Ogilvy, who was living in 1549, and John Ogilvy, who was living in 1586; but it is not known if there be issue male descending from either of such younger sons now in existence. In June 1812 (H. of L. Journ. V. 48, p. 919), Sir William Ogilvy Baronet, of Boyne, presented a petition to the King, claiming the title of Earl of Findlater, having also on the same day presented a petition claiming the Dignity of Lord Banff. He claimed the Earldom of Findlater as nearest heir male of Sir Patrick Ogilvy, created Earl of Findlater in 1641, of Patrick, the second Earl, and of James, the seventh Earl, who last enjoyed the Dignity, alleging that as the whole collateral male heirs of the Ogilvies of Inchmartin and of James Ogilvy, the second of Deskford and Findlater (who was the great-great-grandfather of Sir Walter Ogilvy, created Lord Ogilvy of Deskford in 1616), had failed, the right to the Title had opened to the male descendants of Sir Walter Ogilvy of Boyne, the

immediate younger brother of James, the second of Deskford and Findlater, and that he (the Petitioner) was such male descendant.

No proceedings were, however, taken in support of the claim, and Sir William Ogilvy died in 1824 and was succeeded by his son, Sir William Ogilvy, who died in 1861 without leaving issue.

THE TITLE OF LORD FRASER.

Andrew Fraser of Stanywood, Muchalls and Kinmundy was created Lord Fraser by Letters Patent dated on the 29th of June 1633, to hold to him and his heirs male bearing the name and arms of Fraser.

He was the great-grandson of Thomas Fraser of Cornetoun and Kinmundy, who was (according to the account of this branch of the Fraser family given in the Frasers of Philorth by Lord Saltoun, V. 2, p. 165) probably the representative of Alexander Fraser, the owner of Cornetoun in Stirlingshire at the commencement of the fourteenth century. From the fact that his estate of Cornetoun was in the neighbourhood of Touch-Fraser, it may be supposed that this Alexander was a Cadet of that family, and perhaps a younger brother of Sir Richard Fraser of Touch-Fraser, who died before 1321, and was the ancestor of the Frasers of Philorth, who became Lords Saltoun.

Thomas Fraser exchanged the estate of Cornetoun in Stirlingshire for Stanywood and Muchalls in Aberdeenshire, in which County are situated the Barony and lands of Philorth.

On the death of Charles, the fourth Lord Fraser, in 1720 without issue, the Title became dormant; but the estate of Muchalls by his disposition passed to Charles Fraser of Inverallochy, which family is now represented through a female by Lieutenant-Colonel Mackenzie Fraser of Fraser Castle. The Dignity of Lord Fraser is *de jure* vested in the heir male of the Grantee, whether such heir male descend from Thomas Fraser of Stanywood or from a more remote ancestor.

THE TITLES OF EARL OF GLENCAIRN AND LORD KILMAURS.

Alexander Cunningham of Kilmaurs, the son and successor of Sir Robert Cunningham of Kilmaurs, was created a Lord of Parliament by the title of Lord Kilmaurs about the year 1450, and he sat in Parliament as a Lord of Parliament. He was advanced to the Dignity of Earl of Glencairn by King James III, on the 28th of May 1488, a creation which was held to have been reduced on the accession of King James IV, by an Act of Parliament (generally called the Rescissory Act) of the 17th of October 1488. His grandson Cuthbert was created Earl of Glencairn by belting on the marriage of King James IV in 1503. The Letters Patent of 1488 were exemplified and confirmed under the Great Seal on the 21st July 1637, in favour of William then Earl of Glencairn, his heirs and successors; but the House of Lords in 1797 held that the confirmation was ineffectual to restore the original Dignity.

John the 15th Earl of Glencairn died in 1796 without

issue, and the Title was claimed by Sir Adam Fergusson as heir of line, but the claim was opposed by Sir Walter Montgomery Cunningham, who claimed to be the heir male, and by Lady Harriet Don, the sister of the fifteenth Earl. The House of Lords resolved, on the 14th of July 1797, that Sir Adam Fergusson had shown himself to be heir general of Alexander Earl of Glencairn, who died in 1670, but had not made out the right of such heir general to the Dignity of Earl of Glencairn. This decision proceeded on the grounds that the original grant of 1488 failed through the effect of the Act of Rescission, that a new title of Earl of Glencairn was created in 1503, and that the presumption in law that Peerages of Scotland, where an Instrument of creation is not in existence, are descendible only to the heirs male of the body of the Grantee, governed the descent in the Glencairn case.

The decision of the House in 1797 certainly proceeded on the assumption that the grant in 1503 was a grant to Cuthbert and the heirs male of his body, and it appears to establish that the nearest collateral heir male of John the fifteenth Earl, deriving his descent from an Earl of Glencairn, is entitled to the Honours of Earl of Glencairn and Lord Kilmaurs. Sir Walter Montgomery Cunningham, who opposed the claim of Sir Adam Fergusson, was descended from Andrew Cunningham of Corshill, a younger son of William the second Earl under the creation of 1503, and he appears to have been the nearest heir male. His heir male, Sir William James Montgomery Cunningham, is now entitled to the Dignities, if there be no male issue in existence from Alexander the third Earl, who was the elder brother of William Cunningham of Corshill. Besides the family of Corshill, there are several descendants in the male line from the second Earl of Glencairn,

and although the Titles have been dormant since 1796, they certainly are not extinct.

THE TITLES OF EARL OF HYNDFORD, VISCOUNT OF INGLISBERRY AND NEMPHLAR AND LORD CARMICHAEL.

Sir James Carmichael of Hyndford was created Lord Carmichael, to hold to him and his heirs male whomsoever in 1647, and the Letters Patent granting the Dignity were ratified by further Letters Patent dated on the 3rd of January 1651. The Peerage so granted was not at any time resigned. John the second Lord Carmichael, the grandson of the first Lord, and the son of William Master of Carmichael, who died in his father's lifetime, was on the 25th of June 1701, created Earl of Hyndford, Viscount of Inglisberry and Nemphlar and Lord Carmichael of Carmichael, to hold to him *and* his heirs male *and* of tailzie succeeding to him in his lands and estate conform to his rights and infeftments thereof. If the word "and" be read, as it was in the Polwarth case, as equivalent to and meaning, "whom failing," then the grant was a grant to the heirs male, and on failure of heirs male, to the Grantee's heirs of Entail; or if the words "succeeding to him in his lands and estate" be held, as in the Nairne case, not to qualify or affect the grant to the heirs, then the grant was a grant to the heirs male whomsoever of the Grantee. Whatever construction be put upon the grant of the Earldom, the heir male is certainly entitled to the Dignity of Lord Carmichael under the Letters Patent of 1651. The issue male of the first Lord Carmichael

failed in the person of Andrew the sixth Earl of Hyndford, who died without issue in 1817. It is stated that all the male issue from William Carmichael, the eldest son of John Carmichael who died in 1506, are extinct, and Sir James Robert Carmichael Baronet, now claims to be the heir male of the family, tracing his descent from John Carmichael of Meadowflat, who was the third son of the Sir John who died in 1506, and a younger brother of William who was the ancestor of the Earls of Hyndford. Thomas, the intermediate brother between William and John, was a Priest and the Vicar of Stirling in 1492. The title of Lord Carmichael is certainly, and the title of Earl of Hyndford is probably, vested *de jure* in the heir male of the last Earl, whoever may be that heir male.

The Letters Patent creating the Dignity of Lord Carmichael were not enrolled, and they are quoted in Douglas's Peerage, Wood's Edition. V. 2, p. 686, from the Original in the possession of the then Earl of Hyndford. The Letters Patent granting the Earldom are registered in the Register of the Great Seal.

THE TITLES OF VISCOUNT KENMURE AND LORD LOCHINVAR.

Sir James Gordon of Lochinvar, the seventh in descent from William Gordon, the second son of Adam of Gordon, the ancestor of the House of Gordon of Gordon and Huntly, fell at the Battle of Pinkie on the 10th of September 1547. He left five sons; first, Sir John Gordon; second, William Gordon of

Pennygame, the ancestor to Alexander the fifth Viscount Kenmure; third, Robert who died without issue; fourth, James who obtained a Charter of the lands of Hardlands in 1540; and fifth, Alexander who had a Crown lease of the lands of Slagnaw. Sir John Gordon the eldest son succeeded his father at Lochinvar and died in 1604. His grandson, Sir John Gordon of Lochinvar, was created Viscount of Kenmure and Lord Lochinvar by Letters Patent dated on the 8th of May 1633, to hold to him and his heirs male whomsoever. He died in the following year, and his son John the second Viscount died under age in 1639, and was succeeded by his kinsman John Gordon of Barncrosh, the son of James Gordon, the fourth son of Sir John Gordon, the grandfather of the first Viscount. John Gordon of Barncrosh, who became the third Viscount, died without issue in 1643, and was succeeded by his only brother Robert the fourth Viscount, and on his death without issue in 1663, the male issue of Sir John Gordon, the eldest son of the first named Sir James Gordon, became extinct; and under the destination made by the Letters Patent, the Dignities devolved upon Alexander Gordon of Pennygame, the fourth in descent from William of Pennygame the second son of Sir James Gordon of Lochinvar. Alexander the fifth Viscount Kenmure married thrice. By his second wife he had an only son William, who succeeded him. By his third wife he had two sons, John, whose issue is now extinct, and James who left an only daughter. Alexander Viscount Kenmure died in 1698, and was succeeded by his son William. William the sixth Viscount was tried before the Lord High Steward and his Peers in the House of Lords on a charge of High Treason, and was convicted on the 19th of January 1716, and he was

beheaded on Tower Hill on the 24th of February following. By his conviction his Peerage was forfeited. His eldest son Robert, and his third son James, died unmarried. His only other son John survived him, and was an Officer in the Army, and died in England in 1769. He left five sons, of whom William the eldest, Robert the fourth, and James the fifth, died unmarried. Adam Gordon the third son died in 1806. He had several sons, but the only one of them who survived him was an Officer in the Navy, and succeeded his Uncle the restored Viscount, as the eighth Viscount. John, the son of John who died in 1769, was born in 1750. He obtained a re-grant of the forfeited estates, and was in 1824 restored by Act of Parliament to the Dignities of Viscount Kenmure and Lord Lochinvar, and the Act restored them to the said John and all other persons who would be entitled after him in case the said Judgment for High Treason had never been pronounced. John the restored Viscount died without issue in 1840, and was succeeded by his nephew Adam, the only surviving son of Adam the brother of the restored Viscount. Adam the eighth Viscount died without issue in 1847, and since his death the titles of Viscount Kenmure and Lord Lochinvar have been dormant. It would appear that all the issue male of William Gordon of Pennygame, the second son of Sir James Gordon who fell at the Battle of Pinkie in 1547, became extinct on the death of the eighth Viscount. William had three younger brothers, Robert, who died without issue, and James and Alexander; and although it is probable that they died also without issue, the fact has not with certainty been ascertained. William Gordon, the third son of Sir John Gordon of Lochinvar who died in 1512, and

the immediate younger brother of Sir Robert, who succeeded to Lochinvar on the death without issue male of his elder brother Sir Alexander, obtained a grant by Charter dated on the 17th of September 1500 on his father's resignation of the Barony of Craichlaw, and was the ancestor of the present David Alexander Gordon of Culvennan. William Gordon of Lochinvar, the father of Sir John, had a second son Alexander, to whom the lands of Auchinreath in Kircudbrightshire were granted by Charter on the 29th of October 1490. He was the ancestor of Sir William Gordon of Earlston Baronet, and the representation of the Kenmure family would appear to be vested either in Mr. Gordon of Culvennan, or in Sir William Gordon of Earlston.

THE TITLE OF LORD KINCLEVIN.

John Stewart, called the Master of Orkney as next brother to the then Earl of Orkney, was the second son of Robert Earl of Orkney, a natural son of King James the Fifth, and was created Lord Kinclevin by King James the Sixth. At the conclusion of the "Memoriall of the "evidents and rights (Writs) produced by sundrie Lords "and Earles before the Comissioners deput (deputed) be "the King's Majestie anent the preference and prioritie of "dignitie amongst them in Parliãt and Counsell, togither "with ane short minute of certain rights (writs) extant in "the register concerning the same purpose, which were "not produced before the saids Lords Comissioners 1606" the following passages are entered:—"Sir Michael Bal-"four of Balgarvie Knight is made and create Lord

"Burleigh at Whithall in England 16 July 1607 *without* "*any mention of aires*"—"Lord Kinclevin and Haly-"rudhous." "At Edr. the 5 of Agust 1607 John Stewart, "brother to Patrick Earle of Orkney, is made and creat "Lord Kinclevin *without mention of aires*"—"Mr. John "Bothwell Lord of the sessione and alse of the privie "councell and his airs mail is creat Lord of Halryrud-"house." The Letters Patent creating the Dignities of Lord Balfour and Kinclevin were not recorded in the Register of the Great Seal (*b*), but the original Letters Patent creating the Dignity of Lord Balfour of Burleigh or Burley, the word in the records of Parliament and elsewhere being written sometimes Burley and sometimes Burleigh, were produced in the Balfour claim of Peerage from the muniments of the late Mr. Bruce of Kennet, the heir of line of Sir Michael the first Lord Balfour. (Minutes of Evidence on the Balfour of Burley Peerage Claim, pages 6 and 295). All the estates held by Lord Kinclevin were sold in the seventeenth century, and his family muniments have not been traced. There is little doubt that the Title of Kinclevin was created at the time mentioned in the Memorial (*c*). John Stewart, who was

(*b*) A great number of Charters which passed the Great Seal were not registered. Several grants of Dignities were not entered in the Register, as, for instance (among others), those of the Marquisate of Huntly, the Earldom of Airth, and the Earldom of Northesk. See the Act of 1621, Chap. 24, and the Act of 1672, Chap. 16.

(*c*) The creations of the Peerages of Buccleuch and Blantyre (as well as the creations of the Dignities of Balfour of Burley, Kinclevin and Holyroodhouse above alluded to) are mentioned in the Memorial. The title of Lord Buccleuch was created by Investiture under a Commission directed by the King to the Earl of Montrose, or in his absence to the Chancellor, dated on the 18th of March 1606. The ceremony was probably performed at Edinburgh on the 17th of May following. The Commission was given in evidence on the Annandale Peerage

a Commoner and styled solely Master of Orkney in 1601, was John Lord Kinclevin in 1610 (Minutes of Evidence on the Balfour Claim, pages 315 and 317). He sat by Proxy in the Parliament held on the 4th of August 1621, and his Proxy was placed between the Lord Balfour of Burley, entered in the Roll as Lord Burlie, and Lord Holyroodhouse, the Peerage of Balfour having been created on the 16th of July 1607, and that of Holyroodhouse on the 20th of December 1607. If the statement made in the Memorial be accepted as evidence of the creation of the Dignity of Lord Kinclevin, and Carmichael in his Tracts (page 29) makes a similar statement as to the manner in which the Honour was conferred, then it must be held that it was granted, as that of Balfour of Burley undoubtedly was granted, to the Grantee without mention of Heirs. By the law of Scotland the grant of a heritable subject to a person without mention of Heirs, is a grant to him and his heirs; and there can be no doubt that a Dignity in the Peerage was at all times a heritable subject in Scotland. How far the rule of the Scotch law, applicable beyond question to other heritable rights, applies to a Title of Honour, was much debated in the Balfour of Burley case; and it was finally held that the heir of line, (the heir at law,) of the Grantee was entitled. There was, however, in that case the succession of and enjoyment by the line

claim. (Minutes of Evidence, page 477.) No record of the creation of the Title of Blantyre has been found, but it is mentioned in Carmichael's Tracts, page 28, and the Lords Blantyre always sat in Parliament in the precedency due to a creation of the time mentioned in the Memorial and were placed between the Lord Buccleuch and the Lord Balfour of Burley. The Charter granting the Church lands to John Bothwell and creating him Lord Holyroodhouse with a destination to his heirs male is recorded in the Great Seal Register.

representing the daughter and heir female of the Grantee, which distinguishes it from the Kinclevin case; but it would appear that such succession, although it afforded proof of the true interpretation of the grant, could not be held lawful evidence in the construction of it, as all Instruments must be construed according to the circumstances in which they stood at the date at which they were made, and cannot be construed by subsequent events. Lord Westbury, in observations addressed to the Lord Advocate and in his judgment, based the right of the heir of line expressly upon the Letters Patent which made the grant without mention of heirs. (Proceedings on the Balfour Claim, page 163. Judgments in the same case, page 10.) Lord Kinclevin, as previously mentioned, sat in Parliament by proxy in 1621, in the precedency due to a creation of the 5th of August 1607. In 1628 King Charles the First was pleased to create Lord Kinclevin Earl of Carrick, but on the production of the Letters Patent to the Privy Council on the 22nd of July in that year, the Lord Advocate took exception to the grant on the ground that the title of Earl of Carrick was a Royal Dignity which always vested in the eldest son of the Sovereign. It was subsequently explained that the Title of Carrick granted to Lord Kinclevin was taken from a Township in Orkney, and not from Carrick in Ayrshire, which latter gave the title to the Royal Family; and on the 14th of December 1630, the Letters Patent were by order of the Privy Council delivered to Lord Kinclevin as Earl of Carrick, and the Council directed the Earl to have his place and precedency in accordance with the grant made by them. The destination of the Earldom was to Lord Kinclevin and the heirs male of his body. The Earl

died without issue male in 1652, but leaving an only daughter and heir, Margaret. If the Letters Patent of the 5th of August 1607, created a Dignity descendible to heirs of line, she on her father's death became *de jure* Lady Kinclevin; but she did not assume the Title and was altogether resident in England and unconnected with Scotland. She married Sir Mathew Mennes K.B., and by him, who died in 1645, had an only child, Margaret, who married Sir John Heath of Brasted in the County of Kent and died in 1676. Margaret the only child of Sir John Heath and Margaret Mennes, married the Very Reverend Canon George Verney, who succeeded his father as Lord Willoughby de Broke in 1711; and the representation of the title of Lord Kinclevin has, since the death of Margaret in 1729, been vested in the son of George Lord Willoughby de Broke and his successors, the Lords Willoughby de Broke. If the grant of August 1607 created a Peerage of Scotland descendible to heirs of line, the present Lord Willoughby de Broke (*d*) is *de jure* Lord Kinclevin in Scotland.

(*d*) Lord Willoughby de Broke is also undoubtedly of right Lord Latimer in England under the creation of the Dignity of Lord Latimer under a Writ of Summons dated on the 29th of December in the 28th of Edward the First, through the marriage of Elizabeth the sister and heir of John Nevill the fifth Lord Latimer to Sir Thomas Willoughby. He has, however, never made claim to that Dignity.

THE TITLE OF LORD KIRCUDBRIGHT.

This Dignity was created by Letters Patent dated on the 25th of June 1633, granted to Sir Robert Maclellan of Bombie Knight, and his heirs male bearing his name and arms.

The Dignity descended to the successive heirs male of the body of Sir Thomas Maclellan of Bombie, the father of the first Peer, until that line became extinct on the death of James the fifth Lord Kircudbright, who died without issue male in 1730. The Title was then assumed by William Maclellan of Borness, who was descended from Gilbert the second son of Thomas Maclellan of Bombie, and the right of his son John Maclellan to the Peerage was admitted by the House of Lords, after a long investigation, on the 3rd of May 1773. On the death without male issue in the year 1832 of Camden Gray Maclellan the ninth Lord, the second son of John Maclellan who established his right to the Dignity, the Title became dormant, and it appears probable that in his person the line of his immediate ancestor James Maclellan of Balmangan, who died about the year 1637, became extinct. James Maclellan had two younger brothers, William and Thomas, both of whom were living in 1606; but it has not been ascertained if there be issue male from either of them now in existence.

It is, however, extremely improbable that the family of Maclellan of Bombie should have entirely failed, and Doctor Maclellan, and General George Maclellan of the United States are said to be members of this family. If there be an heir male of the first Peer in existence, the Dignity is *de jure* vested in him.

THE TITLES OF DUKE OF LENNOX, EARL OF DARNLEY, LORD AUBIGNY, TORBOLTON AND DALKEITH.

Esme Stewart Lord of Aubigny in France, the son of John Stewart Lord of Aubigny, who was the third son of John the third Earl of Lennox of the House of Stewart, was created by his cousin, King James the Sixth, Earl of Lennox on the 5th of March 1579-80, to hold to him and the heirs male of his body, and at the same time he received a grant of the Territorial Earldom of Lennox. The Earl was on the 5th of August 1581 created Duke of Lennox, Earl of Darnley, Lord Aubigny, Torbolton and Dalkeith, with all Honours, Dignities and Prerogatives thereto belonging, "to be broukit, joisit, useit, occupit and "possessit, sicklike, and als frelie in all respects and con- "ditions, as ony utheris hes broukit the title, richt and "possessioun of quhatsomevir Dukerie, Erldome, Lord- "schip or Baronie within this Realme in time bygone;" and by the same Instrument the King purported to erect the Territorial Earldom of Lennox into a Dukedom and the Lordship of Darnley into the Earldom of Darnley. The Instrument further directed that proclamation should be made of the creation of Esme as a Duke at the "Mercate "Crose of Edinburghe," and that the Investiture of Esme in his new Honours should be made with all solemnities required; and it appears from the Treasurer's accounts for the time that the ceremony of Investiture was performed in the month of October 1581. The Instrument was recorded in the Books of the Privy Council, and not in the Register of the Great Seal, and the

Grantee sat in Parliament as Duke of Lennox on the 30th of October in the same year. The King's grant of the Territorial Earldom of Lennox to Esme was void, having been made during the King's minority, and the estates were resumed by the Crown, but the declaration that it was void did not affect the Dignities conferred; and in the Act of the Privy Council which, after the death of Esme, declared that the grant of the landed Earldom was void, dated on the 19th of July 1583, Esme was styled the King's late dearest Cousin Esme, Duke of Lennox, Earl Darnley, Lord of Torbolton, Dalkeith and Aubigny. The Territorial Earldom was subsequently again erected into a Dukedom, and granted to Esme's son Ludovic and his heirs male whomsoever, on the 31st of July 1583. The grant of the Dignity of Duke of Lennox did not contain any limitation or destination of the Honour, and by the law of Scotland the grant of a heritable subject without mention of particular heirs is a grant to the Grantee and his heirs. In the Balfour of Burley case, in which the grant did not mention heirs, the Lord Advocate, whilst fully admitting the principle in regard to other inheritances, stated that, although he was not aware of any distinction between the descent of Peerages and landed estates, it was for the House of Lords to determine whether the principle applied to Dignities in the Peerage. (See the Title of Lord Kinclevin.) On the death of the Grantee, the title of Balfour of Burley descended to his daughter, and was for many years borne by her husband in her right as Tenant by the Courtesy of Scotland; but Lord Westbury expressly stated that if the Letters Patent were in evidence, "it would be impossible "for the Committee to consider any aspect of the case

"without that Instrument." In that view, the succession might be considered a contemporary construction of the Letters Patent. From the Judgments given by the Lords who determined the case, it appears that they acted on that view, whilst Lord Chelmsford desired to reserve the more general question. Reliance was placed by the Lords on the words in the Letters Patent, that the Grantee was to enjoy the Dignity "*omni tempore futuro* "*a die et datâ presentium*;" but those words do not appear to be of greater force than the provision in the Lennox grant, that the Grantee was to enjoy his Honour in the same manner and as freely as any others had brooked (enjoyed) any Dukerie, Erldome, Lordschip or Baronie, and there is no doubt that at the date of the grant every Peer of Scotland held a heritable Dignity. If the principle acted upon in regard to the grant of the Peerage of Balfour of Burley be applicable to the Dignity of Duke of Lennox, and if the record in the Books of the Privy Council be held to be sufficient evidence of the grant, and of the contents of such grant as entered in those Books (*e*), then it would appear that the Honour was granted to Esme and his heirs, and that his heir of line is entitled to it. As previously mentioned, Esme Duke of Lennox was deprived of the Lennox Estates, and the grant of them to him was, after his death, declared void

(*e*) A great number of Charters and Letters Patent were not registered in the Great Seal Register. (See the Scotch Act of Parliament of 1621, Chap. 24, and the Act of 1672, Chap. 16. See also Note to the Title of Lord Kinclevin.) The non-registration in no manner affects the validity of a grant, and the only question is as to the evidence that the grant was made and acted upon, and as to the words and form of the grant. It appears from many instances that previously to the Usurpation grants of Peerages were brought before and submitted to and considered by the Privy Council of Scotland.

on the ground that it was made during the minority of the King. Esme retired to France and died there on the 26th of May 1583. He was succeeded by his eldest son Ludovic Duke of Lennox, who, on returning to Scotland, obtained from the King, by a Crown Charter dated on the 31st of July 1583, a grant of all the estates which his father had held, and by the grant the estates were destined to him and his heirs male whomsoever. This grant did not, and it is presumed, as there was no resignation, it could not affect the Honours conferred upon Esme in 1581. Ludovic Duke of Lennox died without issue on the 16th of February 1624, and was succeeded by his only brother Esme the third Duke of Lennox. Esme the third Duke married Katherine Lady Clifton in her own right, the only daughter and heir of Gervase Clifton who was in 1608 created Lord Clifton by Writ of Summons to Parliament, and he had issue by her, besides two sons who died in childhood, five sons, of whom three, Lord John, Lord Bernard and Lord Ludovic, died without issue. Lord James the eldest son succeeded his father, and Lord George, the second surviving son, was killed at the battle of Edgehill in 1642, and left a son Charles who became the sixth Duke. Esme the third Duke, who was in 1619 in his brother's lifetime created Earl of March in England, died on the 30th of July 1624, and was succeeded by his eldest son James, who then became the fourth Duke of Lennox, and who was created on the 8th of August 1641 Duke of Richmond in England, with a limitation, on failure of his own issue male, in favour of his then surviving brothers and their respective issue male. He succeeded to the Dignity of Lord Clifton on the death of his mother in 1637, and died on the 30th of March

1655 during the Usurpation, and left an only son Esme, who succeeded him, and an only daughter Lady Mary Stewart. Esme the fifth Duke of Lennox was under age when he succeeded his father, and he died unmarried in Paris on the 14th of August 1660. On his death the Dignity of Duke of Lennox, if descendible to the heir of Esme the first Duke, ought to have devolved upon his sister Lady Mary, and the Dignity of Lady Clifton must *de jure* have descended to her; but it does not appear that she ever assumed either Title of Honour. She was born in 1649, and was married in 1664 to Lord Richard Butler, a younger son of James the first Duke of Ormonde, but by him, who had been created Earl of Arran in Ireland in 1662, she had no issue, and she died in Ireland at the age of eighteen in 1667. The fact of the existence of Lady Mary and her non-assumption of the Dignity after the death of her brother in August 1660 may afford ground for assuming that the grant of 1581 did not create an Honour descendible to the heirs of line of the first Duke; but as she was only eleven years old when her brother died, and as she herself died under age and was resident after her marriage in Ireland, the force of an objection grounded on her non-assumption may be considered to be to some extent neutralised. On the death of Esme the fifth Duke, his first cousin Charles, the only surviving son of Lord George Stewart, who was killed at Edgehill and who was the fourth (but second surviving) son of the third Duke, succeeded as Duke of Richmond, and he also bore the title of Duke of Lennox; and he of right held that Dignity, whatever may have been the destination, on the death of Lady Mary in 1667. He died without issue in 1672, and the Lennox estates then devolved upon King Charles the

Second as the collateral heir male of Ludovic the second Duke, to whom they were granted in 1583 with a destination to his heirs male whomsoever. Charles the sixth Duke of Lennox had an only sister, Lady Catherine Stewart, who on his death succeeded as Lady Clifton, and had the Peerage of Clifton confirmed to her by a Resolution of the House of Lords in 1674. She married Henry Lord Ibrackan, the son and heir apparent of Henry Earl of Thomond, and her only surviving child Catherine Lady Clifton, married Edward Lord Cornbury, who succeeded his father as Earl of Clarendon in 1709, and she had issue by him, with a son and daughter who died unmarried, a daughter Lady Theodosia Hyde, married to John Bligh, who was created Earl of Darnley in Ireland in 1722, and her grandson John the fourth Earl of Darnley presented a petition in 1829 to his late Majesty King George the Fourth claiming the Dignity of Duke of Lennox and the other Honours created by the Instrument of 1581. The petition was referred to the consideration of the House of Lords, and the Earl of Darnley laid a Printed Case upon the Table of the House in 1830; but he died on the 17th of March 1831 before any further steps were taken in support of his claim, and since his decease no proceedings have been had in reference to the claim made by him.

If the grant of 1581 were a grant which conferred a title upon the heirs of the grantee, then the heir of line would be entitled to the Honours; but if it be held that it created a title solely in the heirs male of the Grantee, the Dignities became extinct on the death of the sixth Duke in 1672.

THE TITLE OF LORD LINDORES.

Sir Patrick Leslie of Pitcairly, the second son of Andrew the fourth Earl of Rothes, was made Commendator of the Abbey of Lindores in the County of Elgin, before the year 1581. He certainly was styled Lord Lindores, but the right of his heirs male to the Peerage having been questioned before the House of Lords in 1791, in consequence of the contested election of Peers to represent the Peers of Scotland in the House of Lords held in July 1790, a grave dispute arose as to the time of the creation of the Peerage, one side insisting that the Honour was conferred upon the Commendator of the Abbey, and the other maintaining that it was conferred upon his son Patrick. This point, although it was keenly contested, does not appear to be very material, as if the father were created a Peer, such creation could not affect the grant of the Dignity of a Lord of Parliament made to the son by the Charter of the 31st of March 1600 (*f*). By that charter, King James granted to Patrick the son and his heirs male whomsoever and their assigns, the whole Manor of Lindores, and erected it into a Temporal Lordship, and granted to Patrick the son and his aforesaids the Title, Honour, Order and

(*f*) The point arose in the case of Colvill of Culross. Sir James Colvill was certainly a Lord of Parliament by the title of Lord Colvill of Culross before 1606, as he is inserted amongst the Lords of Parliament in the Decreet of Ranking made in that year and placed before Lord Scone, whose peerage was created on the 7th of April 1605. A new Charter was granted to Sir James in 1609, which contained a grant of the Dignity to Sir James and his heirs male whomsoever, and in 1723 the House of Lords decided that Sir James's collateral heir male was entitled to the Dignity under that Charter. A very similar case arose in regard to the grants of the Peerages of Broke and Willoughby de Broke in the Peerage of England on the claim to the latter Dignity in 1695.

State of a free Baron and Lord of his (the King's) Parliament to be called Lords of Lindores by reason of the lands and Lordship aforesaid. There was an Act of Parliament passed in 1606 authorizing the King to make a grant of the Abbey to Patrick the son, which was in all probability passed to obviate the objections to a grant of Church lands, arising from the Acts of Annexation of 1587; but if the previous grant of the Abbey lands were affected by the Acts of Annexation, the Acts had no effect upon the grant of the Peerage. Patrick the son of the Commendator, in whose favour the Charter of 1600 was granted, died without issue in 1649, and was succeeded by his brother James, and the Title of Lindores descended in regular succession from him to his son and grandson. David Lord Lindores, the grandson, died without issue in July 1719, and the Title was then assumed by Alexander Leslie of Quarter, the great-great-grandson of Sir John Leslie of Newton, a younger son of the fourth Earl of Rothes, and a younger brother of Patrick the Commendator of Lindores. Alexander constantly voted at elections of Representative Peers without protest or question. He died in 1765, and was succeeded by his only son Francis John, who voted at the elections of Representative Peers in 1767, 1771 and 1774 without protest or question. Francis John died in 1775, and on his death the title of Lord Lindores was assumed by John Leslie of Lumquhat, who was descended from and was the heir male of James Leslie of Lumquhat, the third son of John Leslie, the only son of John Leslie of Newton, the brother of the fifth Earl of Rothes and of the Commendator of Lindores. He assumed the Honour as the collateral heir

male of Patrick Lord Lindores, in whose favour the Charter of 1600 was granted, and he voted at the elections of Representative Peers in 1780 and 1784 without protest or question. He voted as Lord Lindores at the contested election held on the 24th of July 1790, and the Marquess of Tweedale, the Earls of Buchan, Strathmore and Dundonald and the Lords Saltoun, Sempill, Elibank, Kinnaird and Kirkcudbright by their petition to the House of Lords objected to his vote, and prayed that it and also several other votes given against them might be disallowed; and on the 6th of June 1793, the House resolved that the votes given by the Lord Lindores were not good. This resolution differed in form from the other Resolutions by which votes were dissallowed, as in all of them the Resolution was worded to the effect that the votes given by the person who voted under the particular title mentioned were not good. There is no known report of the judgment given against the votes of Lord Lindores nor are the grounds on which it proceeded known. It was, however, merely a decision against the votes given by Lord Lindores on that election, and not a decision against any claim made by him to the Dignity. If the Charter of 1600 did legally grant the title of Lord Lindores to Patrick Leslie and his heirs male, his now heir male must be entitled to the Peerage, and whether the decision of 1793 proceeded upon the insufficiency or invalidity of the grant made by that Charter or on other grounds is a question to be decided. It has not been ascertained whether John Leslie who voted as Lord Lindores in 1790 left male issue nor who is now the collateral heir male of the Commendator of Lindores; but if the line of Leslie of Lunquhat be extinct, it is certain that there are members of the family of Leslie

descending from a common ancestor with the ancestor of the Lumquhat branch now in existence.

THE TITLE OF LORD LYLE.

Sir Robert Lyle of Duchal was created Lord Lyle about the year 1446, and he sat in Parliament as a Lord of Parliament on the 14th of October 1467.

John the fourth Lord Lyle had a son John, but it appears he pre-deceased his father, and died without issue. The fourth Lord was living in 1545, but died not long afterwards without surviving issue male.

The Montgomeries of Lainshaw claim to be the heirs general of the family of Lyle, through Jean, the only daughter of John the fourth Lord Lyle; and members of the Montgomery family tendered their votes as Lord Lyle in 1721, 1722 and 1784, but the votes were not received.

A petition was presented to the House of Lords on the 22nd of December 1790, by Sir Walter Montgomery Cunninghame Baronet, styling himself Lord Lyle, complaining that his vote as Lord Lyle, having been tendered, was refused at the election of Representative Peers held in July in that year, and praying that his vote as a Peer of Scotland might be admitted; but no proceedings were had upon the petition.

The general principle of law in regard of Peerages of Scotland, where the origin of the Peerage is unknown, is that they descend solely to the heirs male of the body of the Grantee; and Sir Walter Montgomery Cunninghame did not set forth in his petition the grounds on

which he claimed that the general principle did not apply to the Dignity of Lord Lyle, although from the repeated claims made by the heirs of line, the ancestors of Sir Walter, to vote as Peers of Scotland under the title of Lord Lyle, there probably existed grounds on which they sought to establish that the Dignity was descendible to heirs of line.

Sir William James Montgomery Cunninghame of Corshill Baronet is now the heir of line. No one appears to have claimed the Dignity as heir male, and it is not known if there be male issue from the first Lord Lyle in existence, although it appears probable that there may be descendants from one or more of the younger sons of Robert the second Lord Lyle; at least the issue from them, if any, is not accounted for.

THE TITLES OF EARL OF MARCHMONT, VISCOUNT OF BLASONBERRIE, LORD POLWARTH OF POLWARTH, REDBRAES AND GREENLAW.

Sir Patrick Home Lord Polwarth (*g*) was created Earl of Marchmont, Viscount of Blasonberrie, Lord Polwarth of Polwarth, Redbraes and Greenlaw, by Letters Patent

(*g*) The title of Lord Polwarth was created by Letters Patent dated on the 26th of December 1690, and was granted to Sir Patrick Home and the heirs male of his body and to the heirs of those heirs. It was decided by the House of Lords on the 25th of June 1835, that Hugh Scott of Harden, who was the son of Lady Diana Home Campbell, a daughter of the third Earl of Marchmont, was entitled to the Dignity. Lords Lyndhurst and Brougham gave lengthened judgments in deciding the case, and the decision established the proposition that the

dated on the 23rd of April 1697, to hold to him and his heirs male whomsoever in all future time.

On the death of Hugh the third Earl of Marchmont in 1794, the issue male of the first Earl became extinct, and the Dignities of right vested in the nearest collateral heir male of the first Earl.

Sir Patrick Home, created Lord Polwarth in 1690, and Earl of Marchmont in 1697, was descended from Sir Patrick Home of Polwarth, the younger brother of George Home of Wedderburn, and a grandson of David Home of Wedderburn, who died in 1469. George Home, who died in 1715, was the heir male of the body of George Home of Wedderburn. He had two sons—George the elder died in 1720, and it was stated in the claim to the Dignity of Earl of Marchmont that his male issue became extinct in 1766. Francis Home, the second son, had two sons, and it was further stated that Alexander the elder died unmarried. John, the second son of Francis, left at his decease in 1791 a son Alexander Home, who in 1822 claimed the Dignity of Earl of Marchmont and the other Honours created by the Letters Patent of 1697. A great deal of evidence was given in support of the claim, but the Claimant died in 1823 before any decision was given. In 1837 Francis Douglas Home, a Captain in Her Majesty's Army, the son and heir of Alexander, renewed the claim to the Dignities, and between the years 1838 and 1843 various proceedings were had upon the claim, and a large mass of evidence was given in support of it. In 1843 Sir Hugh Hume

word *et* in the Letters Patent was equivalent to and meant "whom failing," and that the Letters Patent ought to be construed as a grant to Sir Patrick and the heirs male of his body, whom failing, to the heirs of such heirs male. A full copy of the judgment of Lord Lyndhurst is given in the Appendix.

Campbell, who had succeeded to the Wedderburn estates under an entail, obtained leave to oppose the claim of Captain Home, and in May and June of that year he gave evidence to show that there had been male issue from some of the collateral branches intervening between the Polwarth and the Wedderburn lines, who were not accounted for by the proofs adduced on behalf of Captain Home; and he also alleged that there might be male issue from George Home, the second son of George Home of Wedderburn, who died about the year 1725, and was an elder brother of Francis Home, the grandfather of Alexander Home the original Claimant; and he also proved that George the second son was in America in 1723; but it does not appear from any evidence which was admitted that George had any issue. Sir Hugh Hume Campbell further alleged that Alexander Home, the elder brother of the original Claimant's father, might have left issue, but the evidence tendered on that point was very slight. On the 9th of June 1843, the case in opposition on behalf of Sir Hugh Hume Campbell was concluded, and although it was shown that there had been male issue in some of the collateral lines, which were not accounted for in the evidence given on behalf of Captain Home, it was not proved that there was issue in existence from any of the persons introduced into the pedigree by the evidence given on behalf of Sir Hugh Hume Campbell. Since the Hearing on the 9th of June 1843, no further proceedings have been taken upon Captain Home's claim. The evidence given, however, established the descent of Captain Home, and that an heir male of the Earls of Marchmont must be in existence, whether Captain Home be or be not the nearest heir male.

THE TITLES OF EARL OF MENTEITH AND AIRTH, AND OF EARL OF STRATHERN.

Strathern was one of the original seven Provinces or Territorial Earldoms of Scotland and the Lords of it, whether styled Mormaors or Earls of Strathern, were of the number of the Earls who claimed on a vacancy of the Throne to elect the Monarch. The original Earldom came to the Crown about the middle of the fourteenth Century. King Robert the Second was twice married. His elder son by his second wife Euphemia, the daughter of Hugh Earl of Ross, was Prince David. Prior to the month of June (and probably in that of March) 1371, King Robert created, apparently by Investiture or Belting, Prince David Earl of Strathern; and by a Charter dated on the 19th of June granted the Territorial Earldom of Strathern to David by the style of David Stewart Knight Earl of Strathern, his dear son, to hold to him and his heirs. Assuming that the Charter affords evidence of the limitation of the Dignity, which on principle and authority it appears to do, the Title was destined to David and his heirs of line. David died before 1389 leaving a daughter Euphemia, who succeeded to the Territorial Earldom, and bore the title of Countess Palatine of Strathern, and was so styled in a Charter granted by King Robert the Third, mentioned in Robertson's Index. Euphemia married Sir Patrick Graham, a younger son of the family of Montrose, and he, in her right, was Earl of Strathern, and as Earl of Strathern witnessed several Crown Charters and obtained Letters of safe conduct. He was slain in 1413, leaving by Euphemia an only son, Malise Graham, who was styled Earl of Strathern in 1423. King James the First de-

prived him of the Earldom of Strathern whilst he was under age and a hostage for the King to the King of England. King James subsequently created Malise Graham Earl of Menteith, and on the 6th of September 1427, he by Charter erected certain lands into a Territorial Earldom of Menteith, and granted them to Malise, by the style of his beloved cousin Malise Earl of Menteith and the heirs male of his body. On the assumption that the destination in the Charter was identical with the limitation of the Dignity, it must be presumed that it was granted to Malise and the heirs male of his body; but if that assumption be not deemed conclusive, a similar limitation must be presumed in accordance with the principle established by repeated decisions that where the original creation of a peerage of Scotland is unknown, the presumption in law, in the absence of evidence to the contrary, is that the Dignity is descendible solely to the heirs male of the body of the Grantee. The title of Earl of Menteith, latterly written Monteith, descended in regular succession to William the seventh Earl; each Earl from Alexander the second Earl, the grandson through Alexander Master of Menteith of Malise the first Earl, having been the heir male of the body of the first Earl. John Graham the sixth Earl died in 1598, leaving his son William, who then became the seventh Earl, under age, and in 1610 William was served heir to his Father. In 1630 he obtained a Retour, finding that he was heir of line to David Earl of Strathern. On the 31st of July 1631 the King granted a Charter admitting the title of William to be Earl of Strathern, and confirming the Dignity to him and his heirs male and of entail, and directing that he and they should thereafter be styled Earls of Strathern and Monteith. Earl William sat in

Parliament as Earl of Strathern in 1631 and 1632, and was generally styled Earl of Strathern and Menteith. The King's Charter and the Retour finding the Earl to be the heir of Prince David were subsequently reduced by a Decreet of the Court of Session in 1633, and thereupon the Earl ceased to be styled Earl of Strathern, and became Earl of Monteith. The reduction was caused by the political events of the time, but was legally founded on an allegation that the Earl was not descended from Prince David, and that the King was the heir of the Prince. Evidence still extant appears opposed to the decision of the Court, and if it can be proved that Euphemia, who certainly bore the title of Countess of Strathern, and gave the title of Earl of Strathern to her husband by the courtesy of Scotland, were the daughter of Prince David, the heir of line of the Earl would appear to have a valid claim to the title of Strathern, in case the Decreet of reduction do not form an effectual bar to the establishment of such claim. The Earl, after he had been deprived of the Dignity of Earl of Strathern, was unwilling to become Earl of Monteith, and King Charles by Letters Patent dated on the 21st of January 1633, after reciting the grant of the Earldom of Monteith in the twenty-second year of the reign of King James the First, and that William then Earl of Monteith was retoured undoubted and lawful heir of line of succession to Malise the first Earl of Monteith, erected the lands and Barony of Airth into an Earldom, with the Title and Dignity of Earl of Airth in manner thereinafter mentioned, and did erect them into the Earldom of Airth, and united and annexed the said Earldom to the Earldom of Monteith, without prejudice to the Earldom of Monteith granted by King James, and did make and

constitute William Earl of Monteith and his heirs, Earls of Airth, and to the said Earldom united and annexed the Earldom of Monteith, with place, priority and precedency due to the said Earl and his predecessors as Earls of Monteith; and provided that the Earl of Monteith and his aforesaid heirs should hold the Dignity of Earl of Airth, with the place and precedency before other Earls due to them by virtue of the said Charter, the Charter of 1427, which had been granted to the said Malise, late Earl of Monteith and his aforesaids. William was described in a Charter dated on the 1st of April 1633, as Earl of Airth and Monteith, and his grandson and successor was described in the same manner in a Charter dated on the 4th of February 1670, and in Royal Warrants dated in 1680 the grandson was styled Earl of Monteith and Airth; and William and his grandson sat in Parliament sometimes as Earl of Airth and sometimes as Earl of Monteith, but always in the precedence due to them as Earls of Monteith. William Earl of Monteith and Airth died in the year 1670. His elder son Lord Kilpont was murdered in 1644, and William was succeeded by his grandson, the eighth Earl of Monteith and the second Earl of Airth. The Earl, having no issue, resigned the Territorial Earldoms of Monteith and Airth in favour of James Marquess of Montrose and his heirs male, and he desired also to resign his Dignities of Earl of Monteith and Airth and Lord Kilpont and Kilbryde in favour of the Marquess; but the King, whilst he accepted the resignation of the Territorial Earldoms and directed a Charter of regrant to pass thereupon, refused to accept a Resignation of the Dignities or to interfere with the right of succession to them. The Earl died in 1694, and his Titles have been

dormant since his decease. In 1834 the late Mr. Barclay Allardice claimed the Dignity of Earl of Airth as heir of line to William, on whom the Honour was conferred, contending that the word Heirs in the Letters Patent of 1633 must be read as Heirs of the body of the Earl. The Lord Advocate opposed the claim, and insisted that the word Heirs is flexible and is to be controlled and governed by the context of the instrument in which it is found, and that the Letters Patent only annexed the new Dignity of Earl of Airth to the ancient one of Earl of Monteith, and that no person could be Earl of Airth who was not also Earl of Monteith. The case was heard on several occasions before the Lords Committees in 1839, and on the 15th of August in that year Counsel for Mr. Barclay Allardice prayed the Committee to adjourn the case to the next Session to enable the Claimant to adduce further evidence. No further evidence was adduced, and no further proceedings were had upon Mr. Barclay Allardice's claim; but in 1840 he presented a petition to the Queen claiming the additional Honours of Earl of Strathern and Monteith. No steps were taken upon that claim and Mr. Barclay Allardice died in 1854. In 1870 Mrs. Barclay Allardice, the only surviving child of the former Claimant, claimed the Dignity of Countess of Airth on the same grounds as those relied upon by her father in support of his claim. Her claim was opposed by William Cunninghame Bontine of Ardoch and Gartmore, who had assumed the surname of Bontine instead of that of Graham, and who claimed to be the heir male of the body of the first Earl of Monteith through Sir John Graham of Kilbryde, his second son. Mrs. Barclay Allardice's claim was heard before the Lords Committees during the Sessions of 1870 and 1871, and

Counsel for Mr. Bontine, in opposition to the claim, relied upon grounds similar to those on which the then Lord Advocate had opposed the claim of the late Mr. Barclay Allardice in 1839. The case was further heard on the 21st of July 1871, since which time no further proceedings have been taken, save in so far as that Mrs. Barclay Allardice in 1874 presented a petition praying the House of Lords to direct the late Duke of Montrose to produce certain muniments, an application to which the House refused to accede. Mr. Bontine, who opposed the claim of the heir of line claiming to be the heir male of the Earls of Monteith, claimed descent from a younger son of the first Earl; but Walter, the second son of Alexander the second Earl, was ancestor of the Grahams of Gartur; and if any of Walter's descendants in the male line be in existence, they would have a preferable claim to the Gartmore branch of the family. The Gartur family appears to have been numerous in the earlier part of the last century, but it may since that time have become extinct.

THE TITLE OF LORD MORDINGTON.

Sir James Douglas, a younger son of William the tenth Earl of Angus, married Anne the daughter and heir of Lawrence the fifth Lord Oliphant. Lord Oliphant being apprehensive, as there was no known Writ making a destination of his Peerage, that it might descend to his heir at law, executed a Procuratory of Resignation of his estate and Dignity in favour of his

next heir male, desiring to keep the succession in the male line of his family, but no re-grant followed upon the Resignation. After Lord Oliphant's death the Peerage was claimed by his daughter, as his heir of line. The claim came before the Court of Session, which was then supposed to have jurisdiction in matters connected with the descent of Dignities, there having been no separate House of Peers in Scotland, and on the 11th of July 1633, that Court found that, as there was no Writ creating an entail, the daughter would be entitled but for the Procuratory of Resignation executed by her father, and that that Procuratory, although never acted upon by the King, denuded Lord Oliphant of his Peerage and destroyed all rights of succession in his heirs, and that the Honour was in the King's power, and that he might confer it upon either the Pursuer Lady Douglas, or upon the Defender Patrick Oliphant. The King did, in fact, confirm the Oliphant Peerage to Patrick Oliphant, the heir male. (See the Title of Lord Oliphant.) He, however, on the 14th of November 1641, created Sir James Douglas, the husband of Anne Oliphant, Lord Mordington, and certainly granted a heritable Dignity; and he further granted that Lord Mordington and his successors should hold the same precedency as had been held by Lady Mordington's ancestors, the Lords Oliphant. Lord Mordington does not appear to have sat in Parliament, probably in consequence of the Civil War, but his son and successor was present in Parliament on the 1st of January 1661, and on several other occasions, and he sat in the precedency held by the former Lords Oliphant and above the then Lord Oliphant. The Letters Patent creating the Dignity of Lord Mordington were not enrolled, nor have the original Letters Patent

been traced, but they are to some extent stated in the pleadings on the Lovat succession in 1730. As the Dignity of Lord Mordington was granted in consequence of Lady Mordington's claim to a Peerage, and as the grant of precedency appeared to admit some right in her, it might be assumed that the destination was to the heirs of line; but in the absence of all evidence in respect of the entail made by the Letters Patent, it is not possible to say what decision might be had upon the point. The first Lord Mordington died in 1656, leaving one son and one daughter. The daughter, Anne, married Robert the seventh Lord Sempill, and the present Lady Sempill is her heir of line. The son, William, succeeded as the second Lord Mordington, and was the father of James the third Lord Mordington. The third Lord voted as Lord Mordington at the election of Representative Peers on the 10th of November 1710. His son George the fourth Lord Mordington voted at several elections of Representative Peers, and died on the 10th of June 1741, leaving issue one son Charles, who succeeded him, and two daughters, Mary and Campbellina, the latter of whom died unmarried. Charles the fifth Lord Mordington, declined to bear the Title, but having been arraigned at Carlisle on a charge of High Treason on the 11th of September 1746 as a Commoner, by the description of Charles Douglas Esquire, he pleaded his Peerage (*h*), and, his right having been shown, he was remanded

(*h*) Lord Mordington in his plea assumed that the Dignity was destined to the heirs male of the body of the first Lord, but he did not plead nor refer to the Letters Patent, and carried his title only to the second Lord, who sat in Parliament in 1661. As he was heir of line and also heir male of the second Lord, the destination was imma-

back to prison, and no further proceedings were had against him. He subsequently died without issue, and in his person the male issue of James the first Lord Mordington became extinct. His surviving sister Mary, the wife of William Weaver Esquire, an Officer in the Royal Horse Guards, assumed the title of Lady Mordington, on the ground that it had been granted to the heirs of the body of the first Peer. Having borne the Title for several years, she died without issue on the 22nd of July 1791, and the Dignity has since that time been dormant; but if the grant were to the Grantee and his heirs of line, it is now *de jure* vested in Lady Sempill, as the heir of Anne, the daughter of James the first Lord Mordington, and should Lady Sempill die without issue, it would devolve upon Sir William Forbes Baronet.

THE TITLE OF LORD OCHILTREE.

Andrew Stewart, the eldest son of Walter Stewart, who was the eldest son of Murdac Duke of Albany, was created Lord Avandale by King James the Second about the year 1459. Andrew the third Lord Avandale, changed the name of his Dignity from Avandale to Ochiltree under the provisions of an Act of Parliament passed on the 15th of March 1542-43 during the minority of Queen Mary. Andrew the third

terial to his plea. The plea was evidently drawn by an English Lawyer who had not the Letters Patent before him, and who probably supposed that the ordinary limitation in grants of Peerages of England was also the ordinary limitation in grants of Peerages of Scotland.

Lord Ochiltree and the fifth Peer, having become hopelessly in debt, sold the remains of the Lordship of Ochiltree to his kinsman Sir James Stewart of Killeith, and bound himself to resign the lands and also the Dignity of Lord Ochiltree in his favour. Lord Ochiltree was on the 7th of November 1619, by the name of Andrew late Lord Ochiltree, created Lord Castle Stewart in Ireland, and he obtained a grant of lands in Ulster. King James the Sixth, by his Royal Warrant dated on the 27th of May 1615, consented to accept a Resignation from Andrew Lord Ochiltree of his Peerage in favour of Sir James Stewart, and directed the Chancellor and the other officers of State for Scotland on the completion of Lord Ochiltree's resignation, to regrant the Dignity to Sir James and his posterity. (Minutes of Evidence on the petition of the Earl of Selkirk and other Peers relative to the Return of the Peers chosen for Scotland, 1791-93, page 255.) The Charter, however, which passed the Great Seal of Scotland and was dated on the 9th of June 1615, made a destination of the Dignity which varied from the limitation authorized by the King's Warrant, and the Charter purported to grant the Lordship to Sir James and his heirs male bearing the name and arms of Stewart of the family of Ochiltree. (Same Minutes of Evidence, page 183.) James Lord Ochiltree, who had sat in Parliament as Lord Ochiltree, died in 1659. On the death of his grandson William, the second Lord under the regrant, without issue in 1675, the male issue of Sir James became extinct; but his daughter Catherine was living in 1696, and may have left issue. The Title became dormant on the death of William in 1675, and no claim was made to it until the year 1768, when

Andrew Thomas Stewart, who in 1774 established his right as the then nearest surviving heir male of the body of Andrew the first Lord Castle Stewart, the resigning Lord Ochiltree, to the Peerage of Castle Stewart in Ireland, claimed to vote at the election of a Representative Peer for Scotland, on the ground that he was the nearest heir male bearing the name and arms of Stewart of Ochiltree under the Charter of 1615, but his vote was not received at that election. He subsequently was allowed to vote as Lord Ochiltree at an election of Representative Peers for Scotland in 1790; but the Earl of Selkirk and the other petitioning Peers in their petition to the House of Lords against the Return upon that election objected, amongst other votes, to his vote. Lord Castle Stewart presented a petition to the King claiming to be Lord Ochiltree in Scotland, and also appeared by Counsel before the Lords Committees in support of the vote which he had given at the election. His claim to the Peerage of Lord Ochiltree and the defence of the vote which he had given were heard together on the 10th, 12th and 17th of May 1791, and on the 8th of March 1792. On the 15th of March the Attorney-General, in opposition to the claim, put in evidence the King's Warrant of the 27th of May 1615, authorizing the Regrant in favour of Sir James Stewart, on which Warrant the Lords of the Council on the 8th of June of that year, directed the Crown Charter making the grant to pass. On the 16th of April 1793, the Lords Committees decided, "That "Lord Castle Stewart, claiming the title of Lord Ochil- "tree, and who voted as such, had not made out his "right." No report of the judgment or judgments given when the decision was made has been found, but it has been generally understood that it proceeded on the

ground that the destination in favour of the heirs male whomsoever of James Stewart of Killeith, contained in the Charter of the 9th of June 1615, was not authorized by the King's Warrant of the preceding 27th of May, and was in excess of the grant which he authorized; and it has also been said that the Law Officers of the Crown objected to the evidence of pedigree, although the House of Lords of Ireland had admitted the evidence to be sufficient, and had held Lord Castle Stewart entitled to the Irish Peerage under it. It may be argued that if the decision of 1793 rested upon a variation between the terms of the Royal Warrant and the Charter of 1615, the Lords who decided the case put a somewhat limited construction on the word posterity, in holding it to be synonymous with issue or descendants, and the case would be complicated if the Resignation were made in favour of the heirs mentioned in the Charter, as an existing destination of a Peerage of Scotland could only be lawfully varied by a Resignation, and a Crown grant by Charter or Letters Patent in conformity with the Resignation, if such Resignation were *in favorem*, as Lord Castle Stewart's undoubtedly was. The Court of Session in the Oliphant case in 1633 took a different view of a Resignation *in favorem;* but in the Cassillis case, and in the Sutherland case, it was held by the Lords Committees that the view expressed by the Court in the Oliphant case was contrary to law, and could not be sustained. (Mr. Maidment's Reports of the Cassillis case and Sutherland case, pages 51 and 9.) Since the decision was given in 1793, no claim has been made to the Ochiltree Peerage.

THE TITLE OF LORD OLIPHANT.

Sir Lawrence Oliphant was created a Lord of Parliament by King James the Second or King James the Third, but it is uncertain in what year the Honour was conferred. Sir Lawrence, however, sat in Parliament as a Lord of Parliament on the 14th of October 1467, and the Peerage must therefore have been created before that time. The Dignity descended in regular succession to Lawrence the fifth Lord Oliphant, who succeeded his grandfather, Lawrence the fourth Lord, in 1593, his father, the Master of Oliphant, having perished at sea in 1584. The principle of law, that a Peerage of Scotland of unknown origin shall be presumed to be limited to the heirs male of the body of the Grantee, had not been established by a decision or otherwise in the seventeenth Century; and Lawrence Lord Oliphant, having no son but having a daughter Anne, who became the wife of Sir James Douglas of Mordington, by a Procuratory of Resignation purported to resign his Peerage in favour of Patrick Oliphant his next heir male, desiring to ensure the continuance of his Dignity in the male line of his family; but his Resignation does not appear to have been accepted by the King, and certainly no regrant followed upon it. Lord Oliphant died before the year 1631. There having been no regrant, his daughter claimed the Peerage of Oliphant as his heir at law. The Court of Session exercised jurisdiction on claims to Peerages before the Union, and Lady Douglas's case came before that Court on the 11th of July 1633, when her claim was opposed by Patrick Oliphant. The Lords of Session found that as her father and his predecessors had held and enjoyed the

Dignity, such enjoyment and use, there being no Writ to show an entail, were sufficient to transmit the Title to the heirs female; but that the Procuratory of Resignation, although the King had not conferred the Honour in conformity with it, had denuded Lord Oliphant of the Peerage and barred all claims to it. (Duries' Decisions, p. 685.) Lord Mansfield, in the Cassillis case in 1762, and in the Sutherland case in 1771, declared the decision of the Court of Session contrary to law and justice, (Mr. Maidment's Report of the Cassillis case, p. 51, and of the Sutherland case, p. 9,) and it has been disregarded in all the cases which have come before the House of Lords in which similar questions were raised. The King, according to the statement of Sir John Dalrymple of Stair, subsequently one of the Lords of Session, acted upon the views expressed by the Court of Session, and determined that the heir male should hold the Peerage of Oliphant. (Dalrymple's Collections, p. 396.) In 1641 the King created Sir James Douglas, the husband of Anne, the daughter and heir of Lawrence Lord Oliphant, Lord Mordington, and granted him the precedency due to the former Lords Oliphant; and it appears from the records of Parliament that Lord Mordington sat above the Lord Oliphant. It is certain that the heir male did become Lord Oliphant, as on the 19th of October 1669, Lord Rosse protested that the calling of the Lords Elphinstone, Oliphant, Lovat and Borthwick before him should not prejudice him in his right to precedency before them, and on the 12th of June 1672, Lord Oliphant was present in Parliament as a Lord of Parliament, and sat in the precedency of the former Lords Oliphant. Patrick Oliphant of Newland, (afterwards Lord Oliphant), the heir male, was the son of John

Oliphant of Newland, the second son of Lawrence the fourth Lord Oliphant. The male issue of Patrick Lord Oliphant failed in the person of Francis the tenth Lord Oliphant, who died without issue in 1748. The Title of Oliphant was after the death of Francis assumed by William Oliphant of Langton, descended from Peter Oliphant, the second son of Lawrence the third Lord Oliphant. William voted as Lord Oliphant at the election of a Representative Peer without protest on the 15th of March 1750. He died without issue on the 3rd of June 1751, and the Title of Oliphant has been dormant since his decease. Lawrence Oliphant of Gask, descended from William Oliphant, a younger son of the first Lord Oliphant, appears to have been the next heir male after William, and it is stated that William acknowledged him as his rightful successor, but having taken the part of Prince Charles Edward in the insurrection of 1745 he did not assume the Title. His male heir, or in default of male issue from him, the nearest heir male of his ancestor William, the founder of the Gask branch of the family, would be entitled to the Dignity, and failing issue from William, the male representative descending from George the younger brother of William, if any, would be the next heir to the Oliphant Peerage.

THE TITLES OF VISCOUNT OF OXFURD AND LORD MACGILL OF COUSLAND.

Sir James MacGill of Cranstoun Riddel, the grandson of David MacGill Lord Advocate to King James the Sixth, was created by Letters Patent dated on the 19th

of April 1661, Viscount of Oxfurd and Lord MacGill of Cousland, to hold to him and his heirs male of tailzie and provision whomsoever.

In the year 1662 he obtained, on his Resignation, a Crown Charter of his estates, whereby they were entailed upon himself for life, and after his death upon Robert his son and the heirs male of his body, whom failing, to the Viscount's other heirs male by his then wife, or by any subsequent marriage, whom failing to such person or persons as the Viscount had named or should name by any writing under his hand, whom all failing to his heirs male whomsoever.

James Viscount Oxfurd died in 1663, and was succeeded by his son, Robert the second Viscount Oxfurd, who died in 1706. He had three daughters, one of whom died unmarried. Christian, the elder surviving daughter, married the Honourable William Maitland, and she assumed the title of Viscountess Oxfurd. She died in 1707 leaving an only son, Robert Maitland, who assumed the surname of MacGill, and who claimed to vote as Viscount Oxfurd at the election of a Representative Peer in 1733. Robert the second Viscount Oxfurd, the father of Christian Maitland, resigned his estates into the hands of the Barons of the Exchequer for new infeftment shortly before his death, and he purported to include his Titles of Honour in the Resignation. No Charter, however, passed upon the Resignation during his lifetime. After his death his daughter Christian, who was styled in the Charter Viscountess Oxfurd, obtained an ordinary Crown Charter, dated on the 20th of March 1706, which proceeded on and followed the terms of the Resignation made by Robert Viscount Oxfurd in his lifetime, and by which a new

tailzie in her favour and in favour of her sister and of their respective issue male was created; and the estates were taken and held under that Charter. As, however, the Charter did not proceed upon a Royal Warrant, but solely on the Cachet given by order of the Barons of the Exchequer, it could not affect the Dignities, (Mr. Maidment's Report of the Sutherland Case, pages 17 and 22,) although it validly carried the estates.

James Macgill of Rankiellour claimed at the election of 1733 to vote as Viscount Oxfurd, on the ground that he was the heir male of the first Viscount. He also claimed to be heir male of tailzie and provision, but as the Charter under which he made the claim to be heir of tailzie related only to the estates and was dated after the creation of the Peerage, it could have no bearing upon the Letters Patent which created the Dignities.

James MacGill subsequently presented a petition to the King, and he therein stated that he was the sixth in descent from Sir James MacGill, the eldest son of Sir James MacGill, the great-grandfather, through David his second son, of James the first Viscount Oxfurd. The petition was referred to the House of Lords, and Mr. Maitland MacGill, who had succeeded under the Exchequer Charter to the estates, was allowed to oppose Mr. MacGill's claim.

In 1733 James MacGill, if his pedigree were correctly stated, was the heir male of the first Viscount, but the grant was to the heirs male of tailzie of the Grantee and not to his heirs male, and if no tailzie existed at the time the Dignities were created, there was no heir male of tailzie under the terms of the grant. James MacGill might have been heir of tailzie of the estates under the Charter of 1662, but the Letters Patent of 1661 did not

authorize Lord Oxfurd by a subsequent entail to control or affect the destination of the Honours conferred upon him, and they must be construed as speaking at and solely from the time at which they were granted; and no Resignation of the Dignities conferred in 1661 was made previously to the date of the Charter, nor did the Charter refer to them. In 1733 the entail of the estates made by the Charter of 1662 did not exist, as it was avoided by the Resignation made by the second Viscount and by the Charter which followed upon that Resignation.

Both James MacGill and Robert Maitland MacGill sought to vote at the election of Representative Peers for Scotland in 1733 as Viscounts Oxfurd. The Clerks allowed the vote of Robert Maitland MacGill. James MacGill protested and expressly founded his right on being the heir male, and the heir male of tailzie and provision. (Robertson's Proceedings, pages 136, 137, 138, 139 and 140.) In March 1733-34, James MacGill presented a petition to the King claiming the Dignities, the consideration of which was referred to the House of Lords on the 18th of that month. (H. of L. Journ. V. 24, p. 379.)

The House of Lords referred the consideration of the petition to the Committee for Privileges, and directed that notice of it should be given to Robert Maitland MacGill, the son and heir of Christian, the daughter of Robert the last Viscount Oxfurd. On the 3rd of March 1734-35, the House further ordered that the petitioner James MacGill should give due notice of his petition to the heirs substitute mentioned in the Charter of tailzie and provision of 1706, under which the estates were held by Robert Maitland MacGill.

It appears from the proceedings at the election of the

Representative Peers for Scotland in 1733, that James MacGill maintained that the Charter of 1706 could not affect the claim to the Peerage on two grounds; firstly, "that Robert (the second Viscount) had no power to "alter the course of succession to the said titles of Honour "established by the Patent;" and secondly, "because the "Resignation was not made in the hands of the Crown, "but in the hands of the Barons of Exchequer only, and "not till after the death of the said Robert, the maker "of the said tailzie." (Robertson's Proceedings, page 136.) It is, therefore, plain that James MacGill and his competitor founded their respective claims upon being heirs of tailzie and provision under the instruments of tailzie; but Mr. Maitland MacGill was not the heir male of tailzie and provision under any Charter, and Mr. MacGill was only heir male of tailzie and provision under an entail, which was made by a Charter dated eleven years after the Peerage had been created, and was subsequently avoided. Mr. Maitland MacGill could not claim the Dignities under the Charter of 1706, as it did not proceed upon a Royal Warrant, and as there had been no tailzie when the Peerage was created, no one could take under the grant as the heir male of tailzie and provision.

The House of Lords having required the heirs of tailzie under the Charter of 1706 to have notice of the proceedings, they appeared by Counsel before the Lords Committee and opposed the claim of James MacGill; but Robert Maitland MacGill, who in 1733 assumed the Title and voted as Viscount Oxfurd, did not claim the Dignities, and the only claim before the House was that of James MacGill. (Committee Book for the 3rd of March 1734-35, and for the 22nd of April 1735.) The Lords Committee

on the 22nd of April 1735, resolved "That the Petitioner "had not made out any right to the Honours and Titles "of Viscount of Oxfurd and Lord Makgill of Cousland." No Report of the Judgments has been found, but it appears from papers in the Rankeillour Charter Chest that the then Lord Chancellor (Lord Talbot) entertained doubts as to the effect of the words "heirs male of "tailzie and provision" (doubts which have long since been set aside), and that he was not prepared to say that the Petitioner, Mr. MacGill, had no right, but only to say that he had not made out his right. (Riddell on Scotch Peerages, V. I., pages 382 and 383.)

There was no grant either to heirs male or to heirs of entail, but solely a grant to the heirs male who were heirs male of entail. This appears to have been the view which Lord Lyndhurst took of the Oxfurd case when it was quoted to him on the Annandale Claim on the 6th of June 1844. He said: "In the case of "Oxfurd, the Title of Viscount was given to the Grantee "and his heirs male of tailzie and provision. That was "the destination. There was a subsequent Charter of "the estate entailing the same, but it does not appear that "there was any previous constitution of the heirs of "tailzie and provision before the date of the Charter to "explain what heirs were thereby intended. The expres- "sion was 'heirs male of tailzie and provision,' and that "could not be construed to mean heirs general." Lord Lyndhurst subsequently said: "If there had been a "previous declaration of what the tailzie was, there "would have been something to which you could refer, "but there being nothing of the kind, the question then "was, how was it to be limited; it was to be the heir "of tailzie, which was not general; which could not be

"construed heirs general." As Mr. MacGill was not the heir male of tailzie and provision, he did not answer the description within the terms of the Letters Patent, and as an heir male of tailzie need not have been the heir male of the Grantee, no part of the description was applicable to him. It appears probable, although it was not brought forward in 1733 or 1735, that there had been an entail of the estates before the Peerage was conferred, and if such could now be traced and found to embody an entail in favour of the heirs male whomsoever, the heir male of Mr. MacGill the Claimant in 1733, might be found to be entitled to the Dignities. The heir male of Mr. MacGill however has not been traced.

THE TITLE OF LORD PITTENWEEM.

Frederick Stewart, the fifth in descent from Alexander Stewart the second son of Alan Stewart of Derneley, was created Lord Pittenweem, to hold to him and his heirs and assigns whomsoever, by a Charter dated on the 26th of January 1609, and by the same Charter the lands of the Priory of Pittenweem were created into a temporal Lordship and Barony. The erection was authorized by Act of Parliament in 1606.

Lord Pittenweem was living in 1618, but died previously to 1633 without issue, and the Title has not since been claimed, although it appears almost certain that he must have left heirs in existence at the date of his death. As Lord Pittenweem did not make any alienation, no person could claim as an Assignee, even if a grant of

Peerage to the Assigns of the Grantee could be supported. Both Thomas Stewart the grandfather, and Alexander Stewart the great-grandfather, of Lord Pittenweem left other issue than his father and grandfather, and it is stated that Lord Pittenweem had a sister. If there be an extinction of issue from Alexander Stewart, the heir of Lord Pittenweem must be sought in the issue of Sir John Stewart of Derneley, the elder brother of Alexander, and the elder son of Alan Stewart of Derneley. Sir John was the ancestor of the Earls and Dukes of Lennox.

THE TITLE OF LORD ROSS.

This Dignity appears to have been created in the person of Sir John Ross of Halkhead, who was styled John Lord Ross of Halkhede in Royal Charters granted in 1502 and 1506. His grandson, Ninian Lord Ross, called the third Lord Ross, sat as a Lord of Parliament in the Parliament held on the 16th of November 1524.

The Title descended in regular succession to William Lord Ross, called the fourteenth Lord Ross, who died without issue in 1754, since which time the Title has been dormant. The family estates on the death of William Lord Ross descended to his three sisters, and in 1777 they devolved upon his then only surviving sister, Elizabeth Countess of Glasgow, and on her death they descended to her son George, the fourth Earl of Glasgow. If the principle generally applicable to the descent of Peerages of Scotland, where the act of creation is unknown, govern the succession to the title of Lord Ross, it was descendible solely to the issue male of the first

Lord Ross, and considering the number of generations through which the Peerage descended, and that some of the Peers certainly had younger sons, it appears improbable that the male issue of the first Lord can be actually extinct, although no one has claimed the Dignity as heir male since the death of the fourteenth Lord Ross in 1754.

THE TITLE OF LORD RUTHERFORD.

Andrew Rutherford, the only son of William Rutherford of Quarryholes, a Cadet of the family of Hunthill, was created by Letters Patent dated on the 19th of January 1661, Lord Rutherford, to hold to him and the heirs male of his body, whom failing to any person or persons whom he should please to nominate and designate during his lifetime, and even at the point of death, to succeed him and to be his heirs of tailzie and provision in the same Dignity, according to a nomination and designation to be subscribed by his hand, and under the provisions, restrictions and conditions to be expressed by the said Andrew as his will in the said designation.

He was further created Earl of Teviot on the 2nd of February 1663, to hold to him and the heirs male of his body, but that Title became extinct at his death without issue in 1664.

By a general Settlement dated on the 23rd of December 1663, the Earl of Teviot nominated and appointed Sir Thomas Rutherford of Hunthill to be his heir, according to the power given to him by the Letters Patent, with remainder to his eldest son, whom failing to the nearest

heirs male of the said Sir Thomas, whom failing to the eldest daughter of the said Sir Thomas, providing that her husband should take the name of Rutherford.

Sir Thomas Rutherford accordingly succeeded to the Dignity of Lord Rutherford on the death of the Earl in May 1664 under the Earl's act of nomination, and he sat in Parliament as Lord Rutherford on the 9th of January 1667. Sir Thomas was succeeded by his brother Archibald, who was the third Lord Rutherford, and on the death of Archibald without issue in 1685, the Title descended to his brother Robert. Robert the fourth Lord also died without issue, and on his death in 1724 the Title was assumed by George Durie of Grange, the grandnephew of the Earl of Teviot, and he voted at the election of a Representative Peer in 1733 without protest; but at the election of a Representative Peer held in 1736, John Rutherford, claiming to be the heir male under the Earl of Teviot's act of nomination, protested against the vote of George Durie as Lord Rutherford, and claimed to vote as Lord Rutherford. John Rutherford at the election of a Representative Peer in 1739 produced a Retour finding that he was the heir male of Robert the fourth Lord, and tracing his descent as the great-grandson of Richard Rutherford, a brother of Thomas Rutherford of Hunthill, the grandfather of Robert. Both George Durie and John Rutherford voted as Lords Rutherford at the election of a Representative Peer in 1739, and of Representative Peers in 1741. (*i*)

(*i*) A Memorial on behalf of George Durie was printed in May 1739, (a copy of which is in the possession of the Author,) in answer to a paper drawn up on behalf of John Rutherford, and entitled "The Case "of the Honors and Dignity of Rutherford." Although the Claim of John Rutherford is controverted in the Memorial, no title on behalf of George Durie appears to be made out.

Alexander Rutherford, the son of John, and George Durie both voted as Lords Rutherford at the elections of a Representative Peer held in July and in November 1752. On the 15th of March 1762, the House of Lords ordered both David Durie, the son of George Durie, called in the Order David Drury, and Alexander Rutherford not to presume to take or bear the title of Lord Rutherford; and further ordered that neither of them should be allowed to vote at the elections of Representative Peers. Alexander Rutherford made no further claim to the Peerage, but John Anderson, the son of David Durie's, or Drury's, aunt, and his heir at law, tendered his vote at the election of a Representative Peer held in November 1787, and having been allowed to vote, the House of Lords on the petition of the Earl of Dumfries, against whom he gave the vote, disallowed it, and struck it out of the list of votes given for Lord Cathcart, the opponent to the Earl of Dumfries. George Durie, or Drury, does not appear to have had any valid claim, as under the Earl of Teviot's entail of the Peerage, the Honour was given, on failure of heirs male of the Hunthill Family of Rutherford, to the eldest daughter of Sir Thomas Rutherford of Hunthill, and not to the heir of the Earl's sister, under whom George Durie made his claim. If the pedigree, as stated by John Rutherford and subsequently by Alexander his son, were correct, John certainly was the heir male of Sir Thomas Rutherford of Hunthill, and the person entitled under the Earl of Teviot's disposition, but the truth of that pedigree was controverted and impugned by George Durie. After the year 1762 Alexander Rutherford did not make or prosecute a claim to the Peerage, and it has not been ascertained at what time he died. In 1835 John Rutherford presented a petition

claiming the Dignity as the nearest heir male, and the petition having been referred to the House of Lords, the case was opened on the 10th of April in that year before the Lords Committees for Privileges, and their Lordships having required proof of the failure of issue of Robert the fourth Lord before entering upon the other matters of pedigree, and not having been satisfied with the evidence adduced, they immediately resolved that Mr. Rutherford had not made out his claim, although his Counsel urgently prayed for an adjournment in order to seek for further evidence on the point. Mr. Rutherford having traced amongst the Scottish Records a General Retour taken in 1737, which found that Henry Kerr of Graden was the grandson of Lilias Rutherford, the sister of Robert the last Lord Rutherford and the heir of the said Robert, again petitioned that his right to the Dignity might be admitted; and his petition, having been referred to the House of Lords, came on for hearing before the Lords Committees for Privileges on the 23rd of July 1839, and the Lords Committees being of opinion that the General Retour was insufficient to prove that Robert Lord Rutherford died without issue, again decided that Mr. Rutherford had not made out his claim. It may be thought a little strange that the issue was taken upon that single fact, as all the proceedings from 1733 to 1762 regarding the Rutherford Peerage assumed that Robert had died without issue, and in 1733 and 1736, when the claims were so prominently brought before the Peers of Scotland and the Lord Clerk Register and his Officers, many of them must have known Lord Rutherford, who only died in 1724, and who had voted at the election of Representative Peers held in 1708, 1710 and 1715, and the fact of his having died with or without issue must

then have been well known. Since 1839 there have been no further proceedings in relation to the Rutherford Peerage.

THE TITLE OF LORD SOMERVILLE.

The date of the creation of this Dignity is not known, and it was probably created by Investiture and without writing. Sir Thomas Somerville was in November 1430 Justiciary of Scotland South of the Forth, and on the 20th of March 1438 he was appointed one of the Conservators of a truce with the English under the title of Thomas Dominus de Somervile, and the Peerage of Somerville appears to have been created in his person. His grandson John, called the third Lord Somerville, sat in Parliament as a Lord of Parliament on the 20th of November 1469, and on the 2nd of August 1471.

The title of Lord Somerville does not appear in the Decreet of Ranking of 1606, nor in the list of Peers which is called the Union Roll (*k*), and no Lord Somerville sat in the Parliament of Scotland after the 10th of December 1585.

The Title descended in regular succession from the first Lord to Gilbert the eighth Lord who did not take his seat in Parliament and who died in 1618. His brother, Hugh Somerville of Drum, became on his death *de jure* the ninth Lord, but he never took or bore the Title, and his son, grandson, great-grandson and great-great-grandson also forbore to use the Title or claim the Peerage.

(*k*) The Document called the Union Roll is merely the list by which the Members of the Parliament of 1706 was called.

James Somerville, the son of the great-great-grandson of Hugh, claimed to vote as a Peer of Scotland at the elections of Representative Peers in 1721 and 1722, and in 1723 he presented a petition to the King claiming the Dignity of Lord Somerville, and the petition having been referred to the House of Lords, the Lords Committee on the 27th of May 1723 resolved that the Petitioner had a right and title to the Honour and Dignity of Lord Somerville, and ought to be placed in the Rolls as his ancestor first above mentioned, (Hugh the fifth Lord who sat in Parliament as Lord Somerville in 1524,) with a saving as well to him and to all persons of their rights upon further and better authority shewed for the same. The first sitting in Parliament proved on behalf of the Petitioner was that of 1524. The Lords Committee further found that the Petitioner was duly connected by progress with Gilbert (the eighth Lord Somerville), and that he was both heir male and heir general to Gilbert. The Lords, therefore, did not determine in which character he was entitled to the Dignity. If the general principle governing the descent of Peerages of Scotland, of which no act of creation is known, be applicable to the Somerville Peerage, James Somerville was entitled as heir male, but there may be peculiar circumstances in relation to the Honour which would make the general principle inapplicable. The decision in 1723 left the question open. The Dignity descended in due succession from James, who established his right in 1723 and who was *de jure* the thirteenth Lord, to Hugh the eighteenth Lord, who died unmarried in 1868. Hugh the eighteenth Lord left four sisters, and the eldest of them, the Honourable Louisa Harriet Somerville, who married in 1871 Major General Charles Stuart Henry, C.B., would

now be entitled to the Peerage of Somerville if it be descendible to heirs of line. On the death of Hugh the eighteenth Lord in 1868, the Title was assumed by his first cousin and heir male Aubrey John Somerville, the only surviving son of the Reverend William Somerville, a younger brother of Mark the sixteenth Lord, but he took no steps to establish his right to the Dignity, and he died unmarried on the 28th of August 1870. Since his death the Title has been dormant. The male issue of James the thirteenth Lord appears to have become extinct on the death of Aubrey John, and the heir male must be sought amongst the descendants of the younger sons of his Predecessors, several of whom left younger sons. The fifteenth Lord had two half brothers by his father's second marriage. James, who was *de jure* the eleventh Lord, had two younger sons, John Somerville and George Somerville, both of whom were in the Army. Hugh, who was *de jure* the ninth Lord, had a younger son, Gavin Somerville. Hugh Lord Somerville who sat in Parliament in 1524 had a younger son Hugh, who is stated to have been the ancestor of the Somervilles of Spittal. William the second Lord and John the third Lord left younger sons from whom there were descendants.

It is doubtful if the House of Lords would admit a title in the descendants, should any be in existence, of younger sons of the first and second Lords Somerville, unless it could be shown by evidence, which has not yet been traced, that the Lord Somerville under whom the claim was made had sat in Parliament as a Lord of Parliament. The fact of sitting in the earlier Parliaments of Scotland, however, is less essential in establishing a claim than it is in England, as previously to 1587 the

Lords of Parliament and the Lesser Barons equally sat in Parliament, and in the early lists it is frequently difficult to distinguish the Lords of Parliament from the persons who sat as Barons by reason of their tenure in chief.

No difficulty can arise on that point in reference to a descendant in the male line from John the third, or from any subsequent, Lord Somerville.

THE TITLE OF LORD SPYNIE.

The Lordship of Spynie formed part of the possessions of the Bishopric of Moray, and on the suppression of the Bishopric came to the Crown. On the 6th of May 1590, King James erected the lands of Spynie into a Temporal Barony to be called the Barony of Spynie, and granted them when so erected to Alexander Lindsay his heirs and assigns in fee and inheritance as a free Barony for ever, and granted to Alexander and his aforesaids the Title, Honour, Order and State of a Free Baron to be called Baron and Barons of Spynie. The Charter did not purport to grant the Dignity of a Lord of Parliament or a Seat in Parliament. Alexander Lindsay the Grantee was the fourth son of David Earl of Crawford, and was married to Jean Lyon, the daughter of John Lord Glamis and the widow of Archibald Earl of Angus. Although the Charter of the 6th of May 1590 did not confer the Dignity of a Lord of Parliament, Alexander Lindsay was certainly created a Peer about the time the Charter was granted or shortly afterwards, as he sat as Lord Spynie in Parliament on the 6th of August 1591, and was elected a Lord of the Articles for the

Nobility in the Parliament of 1592. Lord Mansfield in the Cassillis case in 1762 expressed an opinion to the effect that if, at the time the Dignity of an Earl or Lord of Parliament was granted, the lands were erected into an Earldom or Lordship in favour of the Grantee and a particular class of heirs, such erection and grant afforded evidence of the manner in which the Dignity was entailed. He said,—"If the lands were limited to heirs "male, the Title of Honour cannot be supposed to descend "in a different channel from the lands in the Charter." (Mr. Maidment's Report of the Cassillis case, p. 48.) Alexander was apparently created a Peer by Belting or Investiture, as no Writing granting the Dignity appears to have ever existed. In 1592, a year after he had sat in Parliament as a Lord of Parliament, an Act of Parliament was passed which confirmed the Charter of 1590 in all respects but at the same time purported to make a grant of the lands conveyed by it to Alexander Lord Spynie and Dame Jean Lyon Countess of Angus, his spouse and the longest liver of them, and to the heirs lawfully begotten or to be begotten betwixt them, whom failing to the nearest lawful heirs male of Alexander, and to again erect the lands into a Temporal Lordship and Barony, and also to give and grant to the said Alexander Lord of Spynie and his aforesaids the Honour, Estate, Dignity and Pre-eminence of a Lord of Parliament to be entitled Lords of Spynie in all time coming. The Act could scarcely in Law be held to affect the Dignity previously granted, but if it could, it entailed it upon the heirs of the body of Alexander by his then wife, and failing such issue to his heirs male, but if it did not affect the Dignity previously conferred, it created a new Dignity with the same name of Honour in favour of the heirs of Alexander

mentioned in the Act. The Act was required to give validity to the King's grant of Church lands in consequence of the Acts of Annexation of 1587. On the 17th of April 1593, the King by a new Charter made a grant of the same lands, and a grant of the Dignity of a Lord of Parliament by the title of Lord Spynie with the same destination as that made by the Act of Parliament. Alexander Lord Spynie died in 1607, and was succeeded by his son Alexander, who was then under age, and who on coming of age, was in 1621 served heir to his father. Episcopacy having been restored in Scotland, Lord Spynie gave up to the Bishop of Moray the greater part of the lands which had been granted to his father by the Charter of 1590, and the King afterwards, by a Charter dated on the 26th of July 1621, granted other lands to Lord Spynie and erected them and Lord Spynie's own lands of Ballysak, into a new Lordship and Barony of Spynie, and entailed the new Barony upon Alexander and his heirs male and assigns, and further directed and ordained that Alexander and his said heirs should hold the aforesaid Title, Order and Dignity of Lord Spynie, with all Honours, Dignities, Prerogatives and Pre-eminences thereunto belonging according to the tenor of the infeftment (the Charter of 1590) made to his late father, and according to the creation of it into a Temporal Lordship for his said father. There was no Resignation of the Peerage or Dignity of Lord Spynie made before the Charter of 1621 was granted, nor at any subsequent time; and in consequence the Charter of 1621, even if it could be held to create a new Dignity, could not affect the Peerage which had been held by Lord Spynie's father, and to which Lord Spynie had succeeded. Other grants of lands were subsequently made to Lord Spynie and destined to his heirs male. Lord Spynie sat frequently

in Parliament and always in the precedency which his father had held. Alexander Lord Spynie died in 1646, and was succeeded by his only surviving son George, the third Lord Spynie. Alexander's elder daughter Margaret married William Fullarton of Fullarton, and their great-great-grandson claimed the Dignity of Lord Spynie as heir of line in 1785. George Lord Spynie died without issue in 1672, and the Dignity of Lord Spynie has been dormant since his decease. Mr. Fullarton's petition claiming the Honour was referred to the House of Lords, and the case was heard before the Lords Committee for Privileges on the 15th day of March, and on the 14th and 18th days of April 1785. On the latter day the Lords Committee resolved,—"That although the original "creation of the Title, Honour, Dignity and Peerage of "Spynie has not been shown; yet it sufficiently appears "from the Act of Ratification of 1592, the Charter of the "17th of April 1593, and the Charter of the 16th of June "1621, that the descent was limited to the heirs male of "Alexander Lord Spynie: consequently that the Claimant "has no right to the said Peerage." From the short note of Lord Mansfield's judgment printed in Mr. Maidment's Report on Claims to Scottish Dignities, it appears that Lord Mansfield, after stating that the Charter of 1590 did not grant a Peerage, referred the Creation to Belting without writing or mention of succession, and then applied the principle of the male succession where no writing appears to limit the descent of the Honour, adding that it did not wholly rest upon principle, as the Instrument produced, the Act of 1592 and the Charters of 1593 and 1621 were taken to heirs male, and adding that it was highly improbable that the Title should go in the manner contended for to a daughter, "a niece to

"disinherit her uncle." Lord Mansfield appears to have been misinformed as to the Act of Ratification, an Act printed in full in the folio Edition of the Acts of the Parliament of Scotland, V. 3, p. 650, as the Act, after ratifying the Charter of 1590, expressly provides that the Honour of a Lord of Parliament by the title of Lord Spynie should be held by Lord Spynie and his aforesaids, Lord Spynie and the Countess of Angus his spouse in life rent and the heirs lawfully begotten betwixt them, whom failing, by his heirs male whomsoever; and the Charter of 1593 following upon, and passed under the authority of, the Act appears, according to the statement of it given in Mr. Maidment's Report, to have been in similar terms. The heirs male were consequently only to take on failure of issue from Lord Spynie and the Countess, and so long as issue from Margaret, the sister of George Lord Spynie and the granddaughter of Alexander the Grantee, were in existence, the heirs male could neither take nor have any claim. When a Peerage was created without writing, the Sovereign could undoubtedly direct the line of descent. That point was held in the Herries claim, the Herries Peerage having certainly been created without writing, and the Act of Ratification might be held to afford evidence of the existing destination, as it certainly was passed to confirm previous grants. If it did not prove the purport of the prior creation, or if it in any manner varied from the limitation made on the original creation, it appears then in effect to have made a new and additional creation of a Peerage of Spynie, as the Act was a grant made by the King with the sanction of Parliament, and in express terms regranted the subjects previously granted. The point urged as to the improbability of the destination

under which the Spynie Title was claimed would equally apply to every Peerage descendible in the female line. Lord Hailes in commenting upon the decision says that a difficulty arose from the Charter of 1621, and appears to think that the view taken by Lord Mansfield could not otherwise be supported. (Mr. Maidment's Report, page 11.) As there was no Resignation, the Charter of 1621 could not affect the Dignity which had been previously created. Since the decision given in April 1785 no further claim has been made to the Dignity of Lord Spynie. The heir of Mr. Fullarton is the heir of line, and the Earl of Crawford is the collateral heir male, of Alexander the first Lord Spynie.

THE TITLES OF EARL OF STIRLING, VISCOUNT OF CANADA AND LORD ALEXANDER OF TULLIBODY.

These Titles were conferred by Letters Patent dated on the 14th of June 1633 on William Alexander Viscount of Stirling, who was created Earl of Stirling, Viscount of Canada and Lord Alexander of Tullibody, to hold to him and his heirs male bearing the name and arms of Alexander for ever. He had previously been created Viscount of Stirling and Lord Alexander of Tullibody by Letters Patent dated on the 4th of September 1630, to hold to him and his heirs male bearing the name and arms of Alexander.

The Peerages became dormant on the death in 1739 of Henry the fifth Earl without issue.

These Honours were claimed in 1825 by Mr. Alexander Humphreys, who had assumed the surname of Alexander, through his mother Hannah the wife of Mr. William Humphreys. Mr. Alexander Humphreys alleged that his mother was a daughter of John, the grandson of John the fourth son of William Alexander the first Earl of Stirling; but no evidence was given in support of the claim, and the Court of Session, in certain proceedings taken by Mr. Alexander Humphreys against the Officers of State for Scotland regarding the Dominion of Canada, was not satisfied that an alleged Charter, on which Mr. Humphreys relied as altering the destination, was authentic or genuine, or a document on which the Court could act.

A Mr. William Alexander claimed the Honours in 1760 as a direct descendant in the male line from John an uncle of the first Earl, but no decision was had upon his claim. If his claim of descent from the uncle of the first Earl were well founded, it would appear that he must have been in 1760 the nearest heir male of the first Earl and entitled to the Honours. If there be male issue from him in existence, his eldest male representative would apparently be the person in whom, under the words of the grant, the Dignities are *de jure* vested. If the issue of John the uncle of the Earl be extinct, the heir male must be sought for in a more remote ancestor of the Earl than his grandfather; and it appears highly improbable that the male issue in the family should have entirely failed. William Alexander who made the claim in 1760, and who had been duly served in Scotland as the heir male of the fifth Earl in 1759, took up arms against the Crown of England in the American War and was a Major

General in the service of the United States at the time of his death in 1793. It has not been ascertained whether he left male issue. His great-grandfather Alexander Alexander had a younger son Patrick Alexander who married and left issue, and John Alexander the uncle of the first Earl, under whom William claimed, had a younger son James Alexander, and Alexander Alexander, the grandfather of John, had a younger son William, who married Janet Marshal.

THE TITLES OF EARL OF TRAQUAIR, LORD LINTOUN AND CABERSTOUN, AND LORD STEWART OF TRAQUAIR.

James Stewart, a natural son of James Stewart created Earl of Buchan in 1469, obtained letters of legitimation in the most ample form, authorising his heirship to any person to whom but for bastardy he could be heir, dated on the 20th February 1488-89, and in 1491 he received from the Earl of Buchan his father a grant of the lands of Traquair. His great-grandson Sir John Stewart of Traquair was created Lord Stewart of Traquair by Letters Patent dated on the 19th of April 1628, to hold to him and his heirs male bearing the name and arms of Stewart, and he was raised to the Dignity of Earl of Traquair, Lord Lintoun and Caberstoun by Letters Patent dated on the 23rd of June 1633, to hold to him and his heirs male bearing the name and arms of Stewart.

Charles Stewart the eighth Earl died without issue in 1861, when the Titles became dormant. If the issue of James Stewart who was legitimated be extinct, a difficult question may arise upon the effect of the letters

of legitimation as to the right of the legitimate heirs male of James Stewart Earl of Buchan, the father of the legitimated James, as collateral heirs male of that Earl are in existence. The first decision in Ramsay *v.* Gowdie in 1758, (Morrison's Dictionary of Decisions, page 1359) would apparently support the title of the legitimate heirs to become the heirs to the legitimated branch. The second decision in the same case turned upon the wording of the letters of legitimation.

James Stewart who was created Earl of Buchan in 1469 was the son of Sir James Stewart, called the Black Knight of Lorn, by Jane the Queen Dowager of King James the First; and the next brother of the Black Knight of Lorn was Alexander Stewart, the direct ancestor of Sir Archibald Douglas Stewart of Grandtully Baronet, and if there be no issue male from the Black Knight of Lorn now in existence, as is apparently the case, Sir Archibald Douglas Stewart is now the heir male of James Stewart created Earl of Buchan in 1469, and if the letters of legitimation authorise a legitimate heir of the Earl to become the heir of the Earl's legitimated son, Sir Archibald is also the heir male of that legitimated son, and apparently the heir male of the last Earl of Traquair.

THE TITLES OF EARL OF WIGTOUN AND LORD FLEMING.

Robert Fleming, who died about the year 1314, had two sons, Malcolm the ancestor of the original Earls of Wigtoun, and Patrick the ancestor of the Lords Fleming, Earls of Wigtoun of the later creation. Malcolm, the son

of Malcolm, in 1341 received from King David a large grant of lands, which the King erected into the Earldom of Wigtoun with the title of Earl of Wigtoun. Malcolm's grandson Thomas the second Earl sold the Territorial Earldom to Archibald of Douglas, afterwards Earl of Douglas, and resigned it in his favour; and King Robert the Second in 1372 granted a Charter of the Earldom to Archibald of Douglas upon Earl Thomas's Resignation, and Thomas afterwards ceased to be an Earl, and was styled by the King and others Thomas Fleming formerly Earl of Wigtoun. Thomas died without issue shortly after the year 1382. On his death the representation of the family devolved upon the line of Sir Patrick Fleming of Biggar, the second son of the Robert Fleming who died about 1314. Sir Patrick's great-grand-grandson, Sir Robert Fleming, was created Lord Fleming before the year 1460. There is no record of the creation, and he was probably created by Belting or Investiture. The descent proves that the Dignity was limited to his male heirs, as heirs of line were several times passed over in the succession. John the sixth Lord Fleming, the fifth in descent from the first Lord, was the first Earl of Wigtoun of the later creation. King James the Sixth, having determined to raise Lord Fleming to the rank of an Earl, issued a commission to John Earl of Montrose, his Commissioner for Scotland, and, in case of his death or absence, to Alexander Earl of Dunfermline, Chancellor of Scotland, directing the one of them who should be present, acting under the authority of the Commission, and in the King's name and of his authority, to make, constitute, create and inaugurate John Lord Fleming, Earl of Wigtoun, to hold to him and his heirs male of lawful and lineal descent in all time thereafter. The Commission

was dated on the 19th of March 1606. On the 1st of July following the Earl of Montrose by virtue and under the authority of the said Commission and by the King's authority and power made, constituted and created the said John Lord Fleming, Earl of Wigtoun with all solemnities used in such cases to endure to Lord Fleming and his heirs male of lawful and lineal descent in all time thereafter, and the act of creation was thereupon inserted in the Books of the Lyon King at Arms. The Commission and the record of the act of creation were produced from the muniments of Lord Elphinstone in the proceedings of the Mar Peerage claim. (Mar Minutes of Evidence, pages 338 and 658)(*l*). No Letters Patent passed and the creation was effected solely by the ceremony performed by Lord Montrose under the authority of the Commission. Lord Fleming afterwards sat in Parliament as Earl of Wigtoun. The Dignity of Earl of Wigtoun descended in regular succession to Charles the seventh Earl, who died unmarried in 1747, when the family estates descended to his niece, Clementina the wife of Charles Lord Elphinstone, and the daughter and then sole heir of Earl Charles's elder brother, John the sixth Earl. After the death of Charles Earl of Wigtoun, the Dignity was assumed by Charles Ross Fleming of Dublin, who voted as Earl of Wigtoun at the elections of Representative Peers held in 1752 and 1754 without protest. In 1762 he was ordered by the

(*l*) The Dignities of Earl of Home and Earl of Perth were created under a similar Commission dated on the 11th February 1605, addressed to the Earl of Montrose, and in his absence to the Earl of Erroll, Constable of Scotland, and the Dignity of Lord Scott of Buccleuch was created under a similar Commission dated on the 18th of March 1606, addressed to the Earl of Montrose, and in his absence to the Earl of Dunfermline, Chancellor of Scotland.

House of Lords not to assume the Title, and the Officers in Scotland were ordered not to admit him to vote at the elections of Representative Peers until he should establish his right in due course of law. He died in 1769. His son Hamilton Fleming, an Officer in the Army, presented a petition to the King claiming the Dignity in 1776. The case was heard before the Lords Committees for Privileges in 1779, 1781 and 1782, and on the 6th of February in the latter year, the Lords Committees resolved that he had no right to the Titles, Honours and Dignities claimed by his petition. Mr. Hamilton Fleming made his claim as heir male of the Earls of Wigtoun under Alexander the fourth son of the first Earl, and if he could have established a descent from him it appears that his right would have been admitted. The Lords, however, entertained grave doubts as to the authenticity of the documents produced on Mr. Fleming's behalf to establish his descent, and on the 12th of June 1781, they directed Mr. Rose, whom they held to be very conversant with ancient writings, to examine the writings, the genuineness of which they questioned, and to report his opinion thereon to the Committee. On the 6th of February in the following year Mr. Rose made his report and, besides stating particulars, gave his opinion that the papers did not appear suspicious. The Lords however appear to have taken a different view of the writings, and on the same day they decided against the claim. Mr. Hamilton Fleming, who throughout maintained that the writings were genuine, subsequently died without male issue, and he appears to have been the last descendant in the male line from James Fleming, the Rector of a parish in Ireland, whom he alleged to have been a son of Alexander the fourth son of the first

Earl. If the issue male of the first Earl of Wigtoun be extinct, it appears improbable, considering the time at which the Dignity of Lord Fleming was created and the number of generations through which it descended, that there should not still be descendants in the male line from Robert the first Lord, although none appear as yet to have been traced. Much question might also arise as to the words in the King's Commission and in the Act of creation of 1606. Did the words create an entail in favour of the heirs male whomsoever of the Grantee, or was the entail confined to the heirs male of his body? If a destination in favour of heirs male whomsoever be the true construction of the grant, the Dignity cannot be deemed extinct, as there appears to be little doubt that there are male descendants still in existence from Sir Patrick Fleming of Biggar, the founder of the branch from which the Lords Fleming sprung.

THE TITLE OF LORD OF THE YSLES.

The ancient Lords of the Ysles or Isles, after the Kings of Man ceased to hold sovereignty over the Isles, were semi-independent Princes, sometimes acknowledging the Supremacy of the Kings of England, sometimes that of the Kings of Scotland. Angus of Yle, Lord of the Isles, submitted to the authority of King Alexander the Third, and from his time the Lords of the Ysles were subjects of the Kings of Scotland; but although always acknowledged by the Kings as Lords of the Ysles, it does not appear from the Acts of the Parliament of Scotland that any Lord of the

Ysles, previously to the alliance of the D'Yle family with the Earls of Ross, sat as a Lord of Parliament in the Parliaments of Scotland. Donald of Yle or Donald D'Yle, Lord of the Ysles, the great-great-grandson of Angus, married Mary or Margaret the only daughter of Euphemia Countess of Ross by Sir Walter Leslie, who in Euphemia's right was Earl of Ross. Euphemia the only child of Alexander Leslie Earl of Ross, who was the only son of Euphemia and Walter Countess and Earl of Ross, having become a professed Nun, Donald of Yle, in right of his wife, took the title of Earl of Ross and claimed the Territorial Earldom of Ross. He took possession of the greater part of it, but a large force having been led against him by the Regent Duke of Albany, he was compelled to retire from Ross and he died in France in 1427. His widow the Countess of Ross and their son Alexander were taken prisoners by King James the First immediately after Donald's death, but Alexander was soon afterwards released. He shortly afterwards took up arms against the King for the recovery of the Territorial Earldom of Ross, but having been defeated in Battle at Lochaber, he threw himself upon the King's mercy. His life was spared, and he was committed to the Castle of Tantallan as a prisoner, to be there guarded by the Earl of Douglas. His mother died in prison about the year 1429, and thereupon Alexander assumed the Title, and granted charters as Earl of Ross. Alexander was set at large and received a full pardon in 1431. He was restored to the Earldom of Ross, and was Justiciary of Scotland North of the Forth in 1438. Alexander Earl of Ross and Lord of the Ysles died either in 1448 or 1449, leaving issue three sons, John of Yle,

who succeeded him, Hugh the first Lord of Slate, and Celastine of Yle. John Earl of Ross and Lord of the Ysles was forfeited in Parliament in 1475 for entering into treasonable communications with the King of England. In 1476 he was on his submission rehabilitated, and on the 10th of July in that year he in Parliament surrendered the Earldom of Ross to King James the Third, and by an Act of Parliament passed immediately after the surrender, the Earldom of Ross was annexed to the Crown. John Earl of Ross had two natural sons, Angus de Lile and John de Lile, both of whom were living in 1476; but it would appear from a Charter granted in 1478 that John had died without issue previously to that year. On the 15th of July 1476 in and with the assent of Parliament, the forfeiture against John was entirely rescinded, and by the Royal Charter certain of the Isles and all other his forfeited property (*m*), save the Earldom of Ross, the Lordships of Knapdale and Kyntyre and the Offices of Sheriff of Inverness and

(*m*) The Title of Lord of the Isles held by the Sons and Heirs apparent of the Sovereigns of Scotland, and the Dignities of Duke of Rothsay, Earl of Carrick, and Baron of Renfrew also held by them, have been attributed to the Act of the Scottish Parliament passed on the 27th of November 1469, whereby the Territorial Lordships supposed to carry those Honours were settled upon the Sons and Heirs apparent of the Kings of Scotland, and it does not appear that the possession of those Dignities by the Princes can be attributed to any other act of creation. The Islands settled by that Act upon the Princes were distinct from the Islands held by the Lords of the Ysles, and the creation of the Prince of Scotland as Lord of the Isles, did not affect the Dignity held by the Lords of the Ysles. The grant to the Prince was made in 1469, but John Earl of Ross and Lord of the Ysles was fully admitted by the Crown and by the Parliament of Scotland to be Lord of the Ysles until his forfeiture in 1475 and after his restoration in 1476. The Dignities therefore appear to be entirely distinct Honours.

Sheriff of Nairne, were restored to him, and he was created a Lord of Parliament by the Name and Title of Lord of the Ysles. It appears from the *habendum* that the grant of the Isles and lands was made to John and the heirs male of his body, whom failing to his two natural sons, Angus of Ila and John of Ila, and the heirs male of their respective bodies, whom failing to the lawful and nearest heirs whomsoever of John the Grantee; but the Dignity is not named in the *habendum*, and it would appear to be doubtful whether the general words in the Charter can be construed to include it. If they do not, the new grant only extended to John and the heirs male of his body, and as he died without lawful issue, the Honour so granted became extinct on his death; but as the restoration made by the King in Parliament restored John to his temporal Honours and Dignities and to the good fame of his person, the restoration would appear to have restored him to the Dignity of Lord of the Ysles, without regard to his subsequent creation, and the more particularly as in the Charter making the restoration, John is described as having been before his forfeiture Earl of Ross and Lord of the Ysles. The Charter, as before mentioned, excepts the Earldom of Ross from the regrant. It is stated that John Lord of the Ysles after his restoration again entered into treasonable negotiations with the King of England, and that a subsequent forfeiture was declared against him; but although in certain Charters making grants of lands in the Islands to the Macleans and Macleods dated in 1498, the lands granted are stated to have come into the hands of the King by reason of the forfeiture declared against the late John Lord of the Ysles, no actual subsequent forfeiture against him

appears to have been recorded, and the forfeiture referred to in the grants may be the forfeiture of 1475. John Lord of the Ysles and formerly Earl of Ross died without legitimate issue in 1498, and it appears that his natural son John died without lawful issue before 1478, and that Angus the other natural son, although he survived his reputed father and attempted to keep forcible possession of the Isles against the King, died without lawful issue before the year 1503. Hugh the brother of John Earl of Ross and Lord of the Ysles, and a younger son of Alexander Earl of Ross and Lord of the Ysles, became on the death of his brother the heir of the Earls of Ross and of the Lords of the Ysles. Hugh the first Lord of Slate had issue by his first wife Fynvola, a son called John Huchson or Hugh's son, who survived him, but died without issue in 1502; and by his second wife Mary, he had a son Donald, who carried on the line of the family. Hugh the first Lord of Slate died in or before the year 1498. Donald the second son of Hugh succeeded to Slate after the death of his half brother John Huchson, and died in 1506 leaving a son Donald of Slate. Donald the fourth of Slate married Margaret, a daughter of MacDonald of Moydart, and died in 1534, leaving two sons, Donald, who succeeded him at Slate, and James MacDonald, the ancestor of the MacDonalds of Kingsborough. After the death of Donald, the natural son of Angus, the natural son of John Earl of Ross and Lord of the Ysles, who held the greater part of the Islands, and styled himself Lord of the Ysles, Donald, the eldest son of Donald the fourth of Slate, attempted to recover the Islands from King James the Fifth, who had taken possession of the more important

of them; and he raised a large force in support of his pretensions, with which he laid siege to the Castle of Elendounan held for the King, and he was slain in an attack upon it in 1537. Donald the fifth of Slate married Margaret the daughter of Roderick Macleod of Lewis, and by her had a son Donald, who succeeded him at Slate. Donald the sixth of Slate was styled Donald Gorme MacDonald, and was fully restored by Queen Mary against any forfeiture incurred by his father. He was a zealous adherent of Queen Mary, and took an active part in her cause. He died in 1585, leaving issue three sons; first, Donald, who succeeded him at Slate; second, Archibald who married Margaret daughter of Angus MacDonald and died in the lifetime of his elder brother, leaving a son Donald who succeeded his uncle; and third, Alexander. Donald the eldest son succeeded his father, and was the seventh MacDonald of Slate. He married Margaret the sister of Kenneth Mackenzie the first Lord Kintail, but died without issue in 1616, and was succeeded by his nephew Donald, who on his succession became the eighth MacDonald of Slate. He was created a Baronet of Nova Scotia on the 14th of July 1625, to hold the Dignity to him and his heirs male, and the Letters Patent creating the Baronetcy contained a grant which gave precedency to Sir Donald and his Successors immediately after Sir Robert Gordon of Gordonstoun the Premier Baronet of Scotland. Sir Donald married Janet the daughter of Kenneth Lord Kintail and died in 1643, leaving, with other issue, a son and successor, Sir James MacDonald the second Baronet and the ninth MacDonald of Slate, who died in 1678, leaving by Margaret his wife, the daughter of Sir Roderick Mackenzie of Tarbat, with other issue, a son and

successor, Sir Donald MacDonald the third Baronet and the tenth MacDonald of Slate. Sir Donald married Lady Mary Douglas, the daughter of Robert the eighth Earl of Morton and eventually heir to her brother William the ninth Earl of Morton, and he had issue by her three sons; first, Donald who succeeded him; second, James who succeeded to the Baronetcy on the death of his nephew in 1720, and who was the grandfather of Sir Alexander Macdonald the ninth Baronet, created a Peer of Ireland by the title of Lord MacDonald of Slate in the County of Antrim on the 17th of July 1776; and third, Alexander MacDonald who married and had issue. Sir Donald MacDonald the third Baronet died in 1695, and was succeeded by his eldest son Donald. Sir Donald the fourth Baronet and the eleventh MacDonald of Slate adhered to the House of Stuart and was included in the Act of Attainder passed against the adherents of that family in 1715. He married Mary, the daughter of Donald MacDonald of Castletown, and had one son Donald, and four daughters; first, Mary who died unmarried; second, Margaret who married Captain John Macqueen, and had two daughters both of whom died without issue; third, Isabel; and fourth, Janet who married Norman Macleod of Macleod. Sir Donald the fourth Baronet died in 1718, and was succeeded in his estates by his son Donald, who notwithstanding the Attainder was styled Sir Donald. He never married and died in 1720. Isabel MacDonald survived her elder sisters and became the senior heir of line of the MacDonalds of Slate, of the Earls of Ross and of the Lords of the Ysles. She died in 1774, having married in 1725 Doctor Alexander Monro, a Professor in the University of Edinburgh, by whom she had issue a son and heir, John Monro of Auchenbowie, who married

Sophia the daughter of Archibald Inglis of Auchendinny Esquire, and left issue an only child Jane Monro who succeeded to Auchenbowie. Jane married George Home of Argaty, and had issue an only daughter Sophia Home, who succeeded to Argaty and married David Monro Binning of Softlaw, and had a son and heir, George Monro Binning, who on his mother's death succeeded to Argaty and assumed the surname of Home. Mr. George Monro Binning Home is now the heir of line of the Earls of Ross and of the Lords of the Ysles, and if the proceedings in the Parliament of Scotland of 1475 were set aside and the Resignation made by the Earl of Ross in 1476 were revoked, would, but for the Attainder of 1715, be entitled to the Dignity of Earl of Ross, in case it could be shown that that Honour could be held without the landed Earldom of Ross, to which it appears to have been throughout attached, and would also apparently be entitled to the Dignity of Lord of the Ysles, if that Honour were previously to 1476 a Lordship of Parliament and descendible to heirs of line.

DIGNITIES IN THE PEERAGE OF SCOTLAND WHICH HAVE BEEN FORFEITED BY ATTAINDER FOR HIGH TREASON.

THE TITLE OF LORD BALMERINO.

Robert the third Lord Elphinstone certainly had three sons; Alexander his eldest son and successor; George Elphinstone, in Holy Orders of the Church of Rome and Rector of the Scotch College at Rome, his second son; and Sir James Elphinstone his third son. It is alleged that Robert Lord Elphinstone had also a fourth son, who bore the name of John, and who was the ancestor of Sir Howard Elphinstone of Sowerby Baronet. On the 20th of February 1603 King James granted the lands of the dissolved Abbey of Balmerinoch in Fife to James Elphinstone, then Sir James, by a Charter of that date, and erected them into a Temporal Lordship in his favour, and

by the same Charter created him a Lord of Parliament by the title of Lord Balmerinoch, in later times spelt Balmerino, and destined the Dignity and the lands to him and his heirs male and heirs of entail and provision in his infeftment of the lands of Barntoun. The lands of Barntoun were by a Charter dated on the 14th of February 1592 entailed upon Sir James Elphinstone and Sarah Menteith his wife in conjunct fee, and to the survivor of them, and to the heirs begotten between them, whom failing to the legitimate and nearest heirs and assigns of the said James. The destination in the Charter of 1603 making reference to an existing entail differs from the destination in the Oxfurd case, in so much as in that case there was not any known entail to which the destination in the Letters Patent could be referred. (See the Title of Oxfurd, page 90.) The grant of 1603, however, did not in any manner connect either the Abbey lands granted by it or the Dignity with the lands of Barntoun, and merely made the entail in the Charter of those lands the guiding destination by which the Abbey lands, so long as the entail of them should last, and the Dignity, should descend. As to the lands, the Charter of 1603 made merely a simple destination without prohibitory clauses, and the destination might at any time have been avoided or altered upon a Resignation and regrant. The destination of the Peerage could only be varied after a valid Resignation had been made by the holder of it with the consent and by the will and act of the Sovereign. The effect of the limitation created by the Charter of 1603, as construed by the entail of the lands of Barntoun, would appear to be a grant to the heirs male of the marriage of Sir James Elphinstone with Sarah Menteith, and on failure of their

issue male to such of the heirs male of James as should also be his heirs of line. Lord Balmerino was convicted of High Treason in using the King's name in a despatch sent to Pope Clement the Eighth, and was sentenced to death. He was not, however, executed, and he died at his house of Balmerinoch in 1612. By his first wife Sarah Menteith he had an only son John, in whose favour the King granted Letters of Restitution on the 4th of August 1613 (*a*). The first Lord Balmerino married secondly Marjory Maxwell, by whom he had one son James, who was created Lord Coupar (see the Title of Coupar, page 128), and two daughters, Ann married to Andrew the first Lord Fraser, and Mary married to John Hamilton of Blair. On the grant of the Letters of Restitution John Elphinstone became the second Lord Balmerino. He was undoubtedly the heir under the Charter of 1603, as construed by the entail of the lands of Barntoun. John the second Lord died in 1649 and was succeeded by his only son John the third Lord, who was born in 1623. In 1669 Lord Balmerino succeeded to the title of Lord Coupar, under the limitations made in the grant of that Dignity. He died in 1704, leaving only one surviving child, John the fourth Lord Balmerino, who was born in 1652. By his first wife the fourth Lord had one surviving son John, who became the fifth Lord Balmerino, and two daughters, Margaret married to Sir John Preston of Prestonhall, and Jean married to Francis Earl of Moray. By his second wife, the fourth Lord had an

(*a*) In England the heir of an attainted person can be restored solely by an Act of Parliament; but in Scotland the Crown appears from the earliest period to have had the prerogative of granting Letters of Restitution which fully restored the heirs of the attainted person.

only surviving child Arthur, who became the sixth and who was the last Lord Balmerino. John the fourth Lord Balmerino died in 1736, and was succeeded by his eldest surviving son John the fifth Lord, who was appointed a Lord of Session, and took the style of Lord Coupar in 1714. He died without issue on the 5th of January 1746, and was succeeded by his half brother Arthur, who then became the sixth Lord. He was tried by his Peers for High Treason in the Court of the Lord High Steward at Westminster, and on the 1st of August 1746, was found guilty and sentenced to death, and on the 18th of August he was beheaded on Tower Hill. He had no issue, and in his person the issue male of the first Lord Balmerino became extinct, and by his conviction the Dignities of Lord Balmerino and Lord Coupar became forfeited. It is to be presumed from the precedents afforded by the recent restorations of Dignities that if a valid claim could be made to the Honours so forfeited, the grace of the Crown would be extended to the person who might be entitled if not barred by the attainder, in case such person were in a position entitling him to seek the Sovereign's grace. Some question has been raised as to the person who is now the collateral heir male of Arthur the last Lord Balmerino. In the account given in Burke's Peerage and Baronetage of the family of Sir Howard Elphinstone of Sowerby Baronet, it is said that Robert the third Lord Elphinstone had a fourth son named John, and from him the pedigree of Sir Howard is traced as his heir male. No such son is, however, named in Crawfurd's Peerage of Scotland, published in 1716, nor in Douglas's Peerage of Scotland, and the Author has been unable to trace the evidence which is relied upon

to establish the existence of such fourth son. If the existence of such a son be not proved by competent evidence, then beyond all doubt Lord Elphinstone is the collateral heir male of Arthur the last Lord Balmerino. It, however, appears to be a matter of serious question how far a collateral heir male can have a title to the Balmerino Peerage. The Charter of February 1603 makes no destination in favour of the heirs male whomsoever of the first Lord Balmerino, and limits the grant to the heirs male of entail and provision in his infeftment in the lands of Barntoun, and in that infeftment heirs male were not specially mentioned; and the entail was in favour of the heirs of the Grantee's then marriage, whom failing to the Grantee's lawful and nearest heirs. The heirs male of the marriage have certainly failed, and whether Lord Elphinstone or Sir Howard Elphinstone be the heir male collateral, neither of them is the lawful and nearest heir of the first Lord Balmerino, as there are descendants in existence from Jean Countess of Moray the second daughter of the fourth Lord Balmerino, and probably also from her elder sister, Dame Margaret Preston.

THE TITLES OF EARL OF CALLENDAR, LORD LIVINGSTONE OF ALMOND, AND LORD LIVINGSTONE AND ALMOND.

Sir James Livingstone, the third son of Alexander the first Earl of Linlithgow, was created Lord Livingstone of Almond, to hold to him and his heirs male, on the 19th of June 1633, and he was created Earl of Callendar, Lord Livingstone and Almond on the 6th of October 1641, to hold to him and the heirs male of his body;

and in 1646 he obtained further Letters Patent enabling him on failure of his own issue male to make the person who should succeed to him in his estates, his successor in his Honours; and in default of nomination the Dignities were granted on failure of his issue male to Alexander Livingstone, the son of his brother Alexander Earl of Linlithgow. He made a nomination, but as the precept of seizin for taking seizin upon it and the other proceedings were taken under the authority of the Usurping Powers during the Usurpation, it was entirely disregarded after the Restoration. On the 21st of December 1660, King Charles the Second on the prayer of the Earl and after reciting that the Earl had no issue, granted the Dignities of Earl of Callendar, Lord Livingstone and Almond after the death of the Earl to Alexander Livingstone his nephew, the son of his late brother Alexander Earl of Linlithgow by his second wife, and the heirs male of his body, and on failure of such issue to the second son of George then Earl of Linlithgow born or to be born, and the heirs male of his body, whom failing to Alexander Livingstone, the son of the late Sir Alexander Livingstone of Dalderse and the heirs male of his body. Neither the grant made by the Letters Patent of 1646 nor that made by those of 1660 is stated to have proceeded upon a Resignation made by the Earl. James Earl of Callendar died in 1672, and was succeeded under the Letters Patent of 1660 by his nephew Alexander, who became the second Earl of Callendar. He had no issue and died in August 1685, when the Honours devolved under the terms of the grant of 1660 upon his nephew Alexander, the second son of George the third Earl of Linlithgow. George the third Earl of Callendar had an only son

James, who on the death of his father in 1692 became the fourth Earl of Callendar. In 1695 James Earl of Callendar succeeded his uncle George, who died without issue in that year, as Earl of Linlithgow. The Earl was attainted of High Treason by Act of Parliament in 1715, and by his Attainder all his Honours were forfeited, save in so far as Substitutions were in existence which might carry any of the Honours on failure of the Earl's own issue male. The Earl's only son Lord Livingstone died unmarried in 1715, and on the subsequent death of the Earl, the issue male of Alexander the first Earl of Linlithgow became extinct. Alexander Livingstone, the son of Sir Alexander of Dalderse, named in the Letters Patent of 1660, died without issue in 1694; and consequently on the death of James Earl of Linlithgow and Callendar there was a failure of issue male from all the persons named in those Letters Patent. If, however, the Letters Patent did not proceed upon a Resignation, as appears to have been the case, they could not affect any Honours which could be claimed under the previous grants. The Dignity of Lord Livingstone of Almond was granted to Sir James Livingstone, subsequently created Earl of Callendar, and his heirs male on the 19th of June 1633. If the Attainder created by the Act of Parliament were removed, the heir male of the Livingstone family would now be entitled to that Honour. It is said that the first Earl of Callendar, under the authority given to him by the Letters Patent of 1646, executed a second Deed of Nomination on the 7th of May 1660, and that thereby on failure of the issue of Alexander Livingstone and of a second son of the then Earl of Linlithgow, he created a final substitution in favour

of his nearest lawful heirs male and of his assigns. If the Deed of Nomination be extant, or evidence can be given that such a substitution were made by it, the right of the heirs male would, according to the case of Gordon of Park (Craigie, Stewart & Paton, I. 558; Mor. 4737), not be affected by the Attainder of 1715. If, however, the Letters Patent of 1660 proceeded upon a Resignation, although no Resignation is mentioned or alluded to in them, such Resignation might affect any prior title to the Honours purported to be granted by them. On the death of James Earl of Linlithgow and Callendar, Sir Alexander Livingstone of Bedlormie and Westquarter, descended in the fifth generation from Sir George Livingstone of Ogleface Baronet, a younger brother of the first Earl of Linlithgow, and the second surviving son of William the sixth Lord Livingstone, became the heir male of the Lords Livingstone; but the issue male of Sir George Livingstone appears to have become extinct in the person of Sir Thomas Livingstone the tenth Baronet, who presented a petition to the King in June 1821 claiming the Earldom of Callendar as such heir male. (H. of L. Journ. V. 54, p. 504.) No proceedings, however, were taken upon it, and Sir Thomas died without issue on the 1st of April 1853, and the right to the title of Baronet, which was conferred upon his ancestor Sir George on the 30th of May 1625, has not been established by any person since his decease. It is also stated that Sir Alexander Livingstone the ninth Baronet laid a case in 1784 before Lord Kenyon, then Attorney-General, respecting his claim to the attainted titles of Earl of Linlithgow and Earl of Callendar; but he does not appear to have presented a petition claiming the Dignities. The male issue from Sir William Livingstone of Westquarter, the next and

only younger brother of Sir George, appears also to have failed, and the line of Sir George succeeded to the Westquarter estates; and the heir of line, through a sister of Sir Thomas, now holds them. If the male issue from Sir George and his brother Sir William of Westquarter be extinct, then all the issue male from William the sixth Lord Livingstone has failed, and the heir male of the body of his father, the fifth Lord Livingstone, would now be the heir male of the Lords Livingstone. The eldest son of the fifth Lord, John Master of Livingstone, was slain at the Battle of Pinkie on the 10th of September 1547, and as he left no issue, William the second son became the sixth Lord Livingstone. Thomas Livingstone the third son of the fifth Lord succeeded through his marriage to the estate of Haining, and was ancestor of the Livingstones of Haining, and the now heir male of Thomas would appear to be the heir male of the Lords Livingstone, and entitled to all the Honours which the heir male could claim under any Disposition made by the first Earl of Callendar, and would also be entitled under the Letters Patent of the 19th of June 1633 to the Dignity of Lord Livingstone of Almond, if the Act of Attainder of 1715 do not bar the right, or if the effect of it were removed.

THE TITLE OF LORD COUPAR.

James Elphinstone, the younger son of James the first Lord Balmerino, and his only son by his second wife, was created Lord Coupar. By an Act of Parliament passed in 1606 the King was authorized to disannex the Abbey lands of Coupar in Angus from the Crown and to

grant them to James Elphinstone, and by a Charter dated on the 20th of December 1607 the King erected the lands into a Temporal Lordship and granted them, together with the Dignity of a Lord of Parliament by the title of Lord Coupar to James Elphinstone and the heirs male of his body, whom failing to his father Lord Balmerino and his heirs male *and of entail* contained in his infeftment of the Barony of Balumby. In the somewhat similar grant of the Dignity of Lord Polwarth, the word "and" (*et*) was construed as equivalent to "whom failing," and if it be so read in this Charter, then a grant was made to James and the heirs male of his body, whom failing, to his father and his heirs male, whom failing to his father's heirs of entail under the entail made of the lands of Balumby. The entail of the Barony of Balumby was dated on the 12th of August 1601. Balumby was granted to Sir James Elphinstone, afterwards Lord Balmerino, and Marjory Maxwell his second and then wife in conjunct fee and to the survivor, and on the death of the survivor to James Elphinstone their son, afterwards Lord Coupar, and the heirs male of his body, whom failing to his father's heirs male and of entail in his infeftment of the lands of Barntoun. If the decision in the Polwarth case govern the construction of the entail of the lands of Balumby then they were granted on failure of the male issue of James the son to the heirs male of Sir James the father, whom failing to his heirs of entail in the lands of Barntoun. If "*et*" be read as equivalent to "whom failing," then the grant, after failure of male issue to James the son, was in the first instance a grant to the heirs male of Sir James the father, and the grant appears to have been acted upon in conformity with that construction. James Lord

Balmerino the father died in 1612, and James Lord Coupar the son died in 1669, and on his death the Dignity of Lord Coupar devolved upon John the third Lord Balmerino, the grandson of James the first Lord Balmerino, and the grandnephew and heir male of James the first Lord Coupar and also the heir male general of the body of his father. The Coupar Titles having descended with the Balmerino Peerage to Arthur the sixth Lord Balmerino, became forfeited on his conviction for High Treason on the 1st of August 1746. Whatever may be the case in regard to the Balmerino Peerage, the collateral heir male of the first Lord Balmerino would be entitled to the Dignity of Lord Coupar in case the entail be read as giving in the first instance a right to the heirs male of the first Lord Balmerino, if the attainder created by the conviction of Arthur Lord Balmerino and Coupar in 1746 were set aside and no longer allowed to bar the right of the heir male. The question as to the male representation of the family is discussed in the Article on the title of Lord Balmerino.

THE TITLES OF EARL OF CROMARTY, VISCOUNT OF TARBAT AND LORD MACLEOD AND CASTLEHAVEN.

Colin Mackenzie of Kintail who died in 1594, had by his first wife four sons; first, Kenneth who was created Lord Mackenzie of Kintail on the 19th of November 1609, and who was the ancestor of the Earls of Seaforth; second, Sir Roderick Mackenzie of Tarbat; third, Colin, the ancestor of the Mackenzies of Kennock and Pitlundie; and fourth, Alexander of Kilcoy, the ancestor of Sir Evan Mackenzie of Kilcoy Baronet. By his second wife, he

had one son, Alexander, who was the ancestor of the Mackenzies of Applecross and Coul. Sir Roderick Mackenzie of Tarbat the second son died in 1626 leaving six sons; first, Sir John, who was created a Baronet in 1628; second, Kenneth Mackenzie of Scatwell, whose son Sir Kenneth Mackenzie of Scatwell was created a Baronet in 1703 and was the ancestor of the present Sir James John Randoll Mackenzie of Scatwell Baronet; third, Colin; fourth, Alexander Mackenzie of Ballone; fifth, Charles; and sixth, James, both of whom died unmarried. Sir John Mackenzie of Tarbat died in 1654. He had six sons; first, George, who succeeded him; second, John, who died in 1662 without issue; third, Roderick of Prestonhall, whose issue male is extinct; fourth, Alexander, whose male line inherited the Baronetcy, and claimed the representation of the Mackenzies of Cromarty; fifth, Kenneth, whose male issue is extinct; and sixth, James, who died unmarried. Sir George Mackenzie of Tarbat the elder son of Sir John, was created Viscount of Tarbat and Lord Macleod and Castlehaven on the 15th of April 1685, to hold to him and the heirs male of his body, and on the accession of Queen Anne he was created by Letters Patent dated on the 1st of January 1703, Earl of Cromarty, Viscount of Tarbat and Lord Macleod and Castlehaven, to hold to him and his heirs male and of entail. If the word "and" (*et*) be read, as in the Polwarth case, as equivalent to "whom failing," then the grant was to Viscount Tarbat and his heirs male, whom failing to his heirs of entail, but as no special entail is mentioned, the words as to the entail might probably be held to be too uncertain to create a valid destination. Lord Cromarty held several different

estates, and the entail affecting each of them might be different. The Earl of Cromarty died in 1714. He had three sons; John, who succeeded him; Sir Kenneth his second son, whose issue male failed on the death of his son Sir Kenneth in 1763, and Sir James Mackenzie Baronet, his third son, who was a Lord of Session by the title of Lord Roystoun, and who died without surviving issue male in 1744. John the second Earl of Cromarty married thrice, but had no issue by his first wife. By his second wife he had five sons, the three youngest of whom, William, Patrick, and Gideon, died without issue male. George and Roderick were the two elder sons. By his third wife Earl John had three sons, who all died without leaving male issue. Roderick the second son of John Earl of Cromarty had an only son Kenneth Mackenzie, who on the death of Lord Macleod in 1789 succeeded to the Cromarty estates under the regrant of them made to Lord Macleod after the forfeiture and in the year 1784. John Earl of Cromarty died in 1731 and was succeeded by his eldest son George. George the third Earl of Cromarty had three sons, John Lord Macleod, William who died in childhood, and George who died unmarried in the East Indies in 1787. George the third Earl and his eldest son John Lord Macleod took part with Prince Charles Edward in 1745, and were taken prisoners at the Earl of Sutherland's Seat, Dunrobin Castle, in April 1746. The Earl was tried for High Treason before the Lord High Steward sitting in the House of Lords, and was convicted and sentenced to death on the 1st of August following, and upon his conviction his Honours were forfeited. He was not executed, and received a conditional pardon on the 20th of October 1749 and died in London on the 28th of September 1766. His son Lord Macleod was tried before the Commissioners on

the 20th of December 1746, pleaded guilty and was convicted and sentenced to death. He was not executed, and received a full pardon on the 26th of January 1748. Under the authority of the Act of Parliament authorizing the Crown to regrant the forfeited Scotch estates, the Cromarty estates were restored to the son in 1784; but although the former Investitures were in favour of the heir male, the regrant, as was the case in the other regrants, was to Lord Macleod and his heirs. He died without issue in 1789, when the estates devolved upon his cousin Kenneth Mackenzie, the only son of Roderick Mackenzie the second son of John, the second Earl of Cromarty. He died without issue in 1796 when the Cromarty estates descended to Isabella, the eldest daughter of George the third Earl, and then the wife of George the sixth Lord Elibank. She died without issue male in 1801, leaving two daughters. Maria Murray the elder daughter, who succeeded to the Cromarty estates, married Edward Hay Esquire, the brother to the then Marquess of Tweeddale, and he assumed the surname of Mackenzie. By him she had an only son John Hay Mackenzie, who died in 1849 leaving an only daughter, Anne, now the wife of George Granville William Duke of Sutherland, who on the death of her father succeeded to the Cromarty estates (*b*). The male repre-

(*b*) The Queen was graciously pleased, by Letters Patent dated on the 21st of October 1861, to create the Duchess of Sutherland, Countess of Cromartie (not Cromarty), Viscountess of Tarbat and Baroness Macleod of Castle Leod and Baroness Castlehaven of Castlehaven, in the Peerage of the United Kingdom, entailing the Honours after her decease upon Lord Francis Sutherland Leveson Gower her second son and several other substitutes; but it may be assumed that this act of grace would not prejudice any right of the heir male, and if an Act of Restoration were passed in his favour, provision might be made in it to prevent the restored Honours from in any manner clashing in name with those granted by the Queen.

sentation of the Mackenzies of Cromarty, on the death of Kenneth Mackenzie in 1796, was claimed by Alexander Mackenzie, a Lieutenant-Colonel in the service of the East India Company, who assumed the title of Baronet as heir male collateral of Sir Kenneth Mackenzie, the second son of George, the first Earl of Cromarty. Sir Alexander Mackenzie claimed descent from Alexander, the fourth son of Sir John Mackenzie of Tarbat, who was created a Baronet in 1628, and he is believed to have left male descendants. His heir male, as the heir male general of George the first Earl of Cromarty, would be entitled to the Dignity of Earl of Cromarty if his succession to it were not barred by the Attainder of the third Earl on the 1st of August 1746.

THE TITLE OF LORD DIRLETON.

The Dignity of a Lord of Parliament was certainly held by George Halyburton in the reign of King James the Third. He first sat as a Lord of Parliament by the style of Lord Halyburton, and under that designation is ranked amongst the Lords of Parliament from the 1st of March 1478-79 to the 21st of March 1484; but he afterwards was styled Lord Dirleton, and under that Title sat as a Lord of Parliament on the 1st of October 1487, and on the 11th of January 1487-88, and his successors sat as Lords Dirleton. Douglas in his Peerage states that the grandfather, Sir Walter Halyburton, was created a Lord of Parliament about the year 1440 or 1441, but the records of the Parliament of Scotland do not state that he sat as a Lord of Parliament. The Dignity was apparently created by Investiture and with-

out writing, at least no writing appears to have ever been traced to which the creation could be referred. If the evidence be deemed sufficient to show the descent of the Dignity upon the Ruthven family, then it was certainly destined to the heirs of line of the first Peer. Archibald Halyburton the eldest son of George Lord Dirleton, died in the lifetime of his father, leaving an only son James, who succeeded his grandfather as Lord Dirleton, and died soon after his succession to the Honour unmarried. He was succeeded by his uncle Patrick Halyburton, the second son of George Lord Dirleton. Patrick Lord Dirleton died in 1506 leaving three daughters, his coheirs. Janetta the eldest daughter was styled Lady Dirleton. She married William the second Lord Ruthven previously to the year 1529. They had three sons, Patrick who succeeded them, James Ruthven who died without issue, and Alexander Ruthven of Freeland, the ancestor of the Lords Ruthven of the later creation. Patrick Lord Ruthven and Dirleton was the principal actor in the murder of Rizzio in the Queen's presence, and afterwards fled to England where he died in 1566. His eldest son Patrick Master of Ruthven died in his lifetime, and William his second son succeeded him and was created Earl of Gowrie; and in a grant of the lands of the dissolved Abbey of Scone made to him on the 20th of October 1581, and confirmed by Parliament on the 29th of November following, and in other records he is described as William Earl of Gowrie, Lord Ruthven and Dirleton. He had five sons; James, who was restored to the Honours forfeited by his father; John, who succeeded his brother; Alexander, killed at Perth on the 5th of August 1600; William, who died abroad without issue, and Patrick. William Earl of Gowrie was

tried for High Treason at Stirling on the 28th of May 1584, was convicted and immediately afterwards executed. James the eldest son was fully restored in Blood, Honours and Estate in 1586, and died in the fourteenth year of his age in 1588. John the third Earl and his brother Alexander were killed by King James and his suite in the Earl's Castle at Perth on the 5th of August 1600, in what has since been called the Gowrie Conspiracy. Scarcely any event in Scottish History has given rise to more controversy than this Conspiracy, it having been alleged on one side that it was a Conspiracy against the King, and on the other that it was a Conspiracy formed by the Court against the Earl. The dead bodies of the Earl and his brother were brought to Edinburgh, and it was found and declared that they had both been guilty of High Treason, and proceedings were taken against their younger brother William then under age, his Tutors and Curators having been summoned on his behalf, and also against Alexander and Henry, the two sons of the late Alexander Ruthven of Foreland or Freeland, the younger son of William the second Lord Ruthven. Full copies of the Depositions and proceedings are given in Pitcairn's Criminal Trials, V. 2, from page 148 to page 332. Most of the witnesses were more or less Attendants upon or Noblemen in the service of the King, and many of them were rewarded for acting against Lord Gowrie, partly by grants of Dignities and partly by grants of portions of the large estates seized by the Crown upon the Earl's Attainder, and no witnesses were, or apparently could be, called to explain Lord Gowrie's conduct. There are several matters which appear extremely improbable in the accounts given in the Depositions, and no adequate or sufficient reason was

apparently suggested for the terrible crime alleged against Lord Gowrie and his brother Alexander. An Act of Parliament was passed on the 15th of November 1600, declaring the Earl and his brother to have been guilty of High Treason and forfeiting all their Honours and possessions, and directing their name, memory and Dignity to be extinguished, and enacting that the name of Ruthven should be abolished, and that the two surviving brothers should be incapable of succeeding to and of holding any Offices, Honours or possessions. Under this Statute all the Dignities (*c*) held by the Earl were forfeited. The Earl and his brother Alexander died unmarried, and their brother William died, also unmarried, abroad. Patrick Ruthven, the fifth son, was an eminent Physician, but was kept a Prisoner, latterly in the Tower of London, until 1619. He left an only daughter Mary, who married Sir Anthony Vandyke, the great Painter, and by him she had an only daughter

(*c*) The Dignities forfeited were those of Earl of Gowrie, Lord Ruthven and Lord Dirleton. The title of Lord Ruthven was conferred by Investiture in Parliament on the 29th of January 1487-88, and, according to decisions on the subject, must be held to have been descendible only to the heirs male of the body of the Grantee. If the Dignity were so limited it apparently would have become extinct, had it not been forfeited. The title of Earl of Gowrie was created in 1581, and conferred upon William the fourth Lord Ruthven. The ancestor of Lord Ruthven, according to the statements in the Charter granting to Lord Ruthven the lands of Gowrie and the other possessions of the dissolved Abbey of Scone, had originally founded the Abbey and granted the possessions, and the King on the dissolution of the Abbey restored the possessions to Lord Ruthven as the heir of the Founder; and in the Act of Parliament passed on the 29th of November 1581 confirming the grant, and also confirming the grant of the Dignity of Earl of Gowrie, or regranting that Honour, the destination was to Lord Ruthven and his heirs male and of entail. If there be a male heir of the family of Lord Ruthven in existence, he would be entitled to the Dignity of Earl of Gowrie, if his right to it were not barred by the Act of Attainder of November 1600.

Justiniana or Justina, who married Sir John Stepney Baronet, and their great-grandson, Sir Thomas Stepney Baronet, had with two sons, successively Baronets, who both died without issue, two daughters, Elizabeth Bridgetta, who married Joseph Gulston of Knuston Hall, Northamptonshire, M.P., and Justina Maria, who married Andrew Cowell Esquire, and the son of Justina Maria, Sir John Cowell, who assumed the surname of Stepney and was created a Baronet in 1871, was the father of the present Sir Emile Algernon Arthur Keppel Cowell Stepney Baronet. Elizabeth Bridgetta who died in 1779, left issue by Joseph Gulston who died in 1786, a son Joseph Gulston, who died in 1790. Joseph's son and heir, Joseph Gulston of Knuston Hall, died in 1841, leaving a son Alan James Gulston of Derwydd and Knuston Hall, who but for the Act of Attainder passed against the Earl of Gowrie in 1600 would be entitled to the Dignity of Lord Dirleton, in case the evidence be sufficient to establish that the Honour was granted to the first Peer and the heirs of his body.

THE TITLES OF VISCOUNT OF DUNDEE AND LORD GRAHAM OF CLAVERHOUSE.

John Graham of Claverhouse, the celebrated General, was on the 12th of November 1688, created Viscount of Dundee and Lord Graham of Claverhouse to hold to him and the heirs male of his body, whom failing, to his heirs male whomsoever. He was killed at the Battle of Killiecrankie in the moment of victory in 1689, and on the 13th of June 1690 a Decreet of forfaulture was pronounced against him by the description of John late Viscount of

Dundee. His only son died in infancy, and on the son's death, David the brother of the first Viscount assumed the title of Viscount of Dundee as the heir male. He died without issue in 1700. The family of Graham of Duntroon which derived its descent from Walter Graham, the younger brother of George Graham of Claverhouse, the grandfather of the first Viscount, became the nearest heirs in the male line on the death of David, and if the forfeiture should be rescinded, the male heir of the family of Duntroon would be entitled to the Dignities. Should the male line of the Duntroon family have failed, there may be issue male from John Graham, the uncle of Walter the first of Duntroon, and there appear to be male heirs now in existence who derive their descent from Robert Graham of Fintry, the elder brother of John Graham the ancestor of the first Viscount Dundee, and the eldest son of Sir Robert Graham of Fintry, the younger son of William Lord Graham the ancestor of the Dukes of Montrose. The late Lord Lynedoch and the Grahams of Balgowan and Garvock were of the Fintry branch of the family.

THE TITLES OF EARL OF DUNFERMLINE AND LORD FYVIE.

George the fifth Lord Seton, who died in 1585, had five sons; first, George Master of Seton, who died without issue in his father's lifetime; second, Robert who succeeded his father and was created Earl of Wintoun; third, Sir John Seton of Barns, the ancestor of the Setons of Barns; fourth, Alexander Seton, created Earl of Dunfermline; and fifth, William of Kyllismore who died in 1634, leaving two sons both of whom died without issue. Alexander the fourth son was appointed

a Lord of Session in 1587, and took the title of Lord Urquhart. On the 4th of March 1597-98, the lands of Fyvie were erected into a Temporal Lordship in his favour, and together with the Dignity of a Lord of Parliament by the title of Lord Fyvie were granted to him and the heirs male of his body, whom failing, to his immediate elder brother, Sir John Seton of Barns and the heirs male of his body. Under a Commission granted by King James on the 11th of February 1605 directing John Earl of Montrose, or in his absence Francis Earl of Erroll, to inaugurate Alexander Lord Home into the Dignity of Earl of Home and James Lord Drummond into the Dignity of Earl of Perth, and to invest them with those Honours, the Lords Home and Drummond were raised to the rank of Earls, and the Commissioner who acted was further ordered to inaugurate Alexander Lord Fyvie into the rank of Earl of Dunfermline. (Minutes of Evidence on the Perth Claim of Peerage, pages 13 and 14.) For some reason, which has not been ascertained, the inauguration of Lord Fyvie did not take place, and by Letters Patent dated at Royston on the 4th of March in the same year, (1605) Lord Fyvie was created Earl of Dunfermline, to hold to him and his heirs male. He was appointed Lord Chancellor of Scotland in 1604, and held the office until the time of his decease. He died on the 16th of June 1622, leaving an only son Charles, who succeeded him. Charles the second Earl of Dunfermline had three sons, Alexander, his successor, Charles who was killed in an action at Sea in 1672, and who died without issue, and James who succeeded his brother Alexander as Earl of Dunfermline. The second Earl died in 1673, and was succeeded by his eldest son Alexander as the third Earl of Dunfermline. Earl Alexander survived his

father a very short time, and having died unmarried was succeeded by his only surviving brother, James. James the fourth Earl of Dunfermline joined Lord Dundee and fought by his side at the battle of Killiecrankie. A Decreet of forfaulture (*d*) was passed against him in King William's Parliament of Scotland in 1690, and thereby his Honours were held to be forfeited. He followed King James to France and died without issue at St. Germains in 1694, and in his person the male issue of the first Earl of Dunfermline became extinct. Sir John Seton of Barns, the immediate elder brother of Alexander the first Earl of Dunfermline, died in the year 1594, and his son Sir John Seton of Barns was served heir to him on the 3rd of October 1615. If there be male issue in existence either from Sir John the son, or Sir John the father, the representative in the male line of such issue would, if the effect of the forfeiture were set aside, be entitled to the Dignity of Earl of Dunfermline under the terms of the grant as the collateral heir male of the Grantee, and without any reversal of the attainder would be entitled to the Dignity of Lord Fyvie as the heir male of the Substitute named in the Charter of creation. If the issue male of Sir John Seton of Barns be extinct, the Dignity of Lord Fyvie has failed, but it would appear that on a reversal of the attainder, the Earl of Eglinton would be entitled to the title of Earl of Dunfermline, as the heir male of the body of the eldest brother of the first Earl of Dunfermline, Robert the sixth Lord Seton, who was created Earl of Wintoun in 1600.

(*d*) In the Perth and Strathallan cases, Decreets of forfaulture were reversed by Acts of Parliament and the Dignities restored. Act 5th of George the Fourth, c. 48, No. 250, Act 16th & 17th Victoria, c. 31, passed on the 28th of June 1853.

THE TITLE OF LORD DUNKELD.

Sir James Galloway of Carnbie, the son of the Reverend Patrick Galloway the Presbyterian Minister for Edinburgh, was created Lord Dunkeld on the 15th of May 1645, by Letters Patent which are registered in the Register of the Great Seal, but the destination of the Dignity in the record is almost entirely illegible. The only portion of the destination which can now be deciphered is as follows:—"*Facimus, constituimus et* "*creavimus* (sic) *prenominatum Dominum Jacobum Galloway* "*ac here . . . . . procreatos seu procreandos* "*Dominos et Barones de Dunkeld ac Dominos Parliamenti,*" &c. The Signature for the Patent is not recorded and it is not known if the original Letters Patent be in existence. The presumption in law under the circumstances of the case would apparently be that the destination was in favour of the grantee and the heirs male of his body.

The title of Lord Dunkeld descended to James the third Lord against whom a Decreet of forfaulture was pronounced by the Parliament of Scotland in 1690, and by that Decreet the Peerage of Lord Dunkeld was forfeited.

Thomas the second Lord Dunkeld, the son and successor of James the first Lord, left two younger sons John Galloway and Andrew Galloway, and if there be an heir male descended from either of them such heir male would appear to be entitled to the Peerage on a reversal of the Decreet of forfaulture, as the attainted Lord had an only son, and such son is stated to have died without issue.

THE TITLE OF LORD FORBES OF PITSLIGO.

The Dignity of Lord Forbes of Pitsligo was created by Letters Patent dated on the 24th of June 1633. The peculiar language of the destination in the Letters Patent is referred to in the Introduction. The grant was made to Alexander Forbes during all the days of his life, and after his death to the heirs male of his body legitimately to be begotten *or* (*vel*) to their heirs, whom failing, to his heirs male whomsoever bearing the name and arms of Forbes of Pitsligo. It appears from the language of the Letters Patent that Alexander Forbes, whether married or not, had no issue male at the time he was created a Peer. If the word "*vel*" can be read as equivalent to "*et*," the construction of the grant would be governed by the decision of the House of Lords in the Polwarth case, but if it cannot, the grant may possibly be construed as a grant to the heirs male of the Grantee's body, if such heirs should be in existence at the time of his decease, and if not, then as a grant to the heirs of line of such heirs male, with a grant over to the heirs male collateral on failure of either class of heirs. The latter construction would not give a right to the heirs of line of the son of Lord Forbes of Pitsligo, if the son survived Lord Forbes, but if the word "*vel*" be construed as equivalent to or as meaning "*et*," then the heir of line would be entitled. Although the Title granted by the Letters Patent was that of Lord Forbes of Pitsligo, the Peers deriving under the grant generally sat in Parliament under the title of Lord Pitsligo. Alexander Lord Forbes of Pitsligo died in 1635, leaving two infant children, a son Alexander, and a daughter Mary,

surviving him; and on the 30th August 1636 Alexander Forbes of Boyndlie, the son of John Forbes the younger brother of Alexander, the grandfather of the first Peer, was, as nearest Agnate, served Tutor at Law to Alexander and Mary, and on the death of Alexander of Boyndlie, his son Alexander Forbes of Boyndlie was by a Retour taken on the 31st of July 1638 served, as the then nearest Agnate, Tutor at Law to the two infant children of the first Lord. Alexander the second Lord came of age during the Usurpation and sat as Lord Pitsligo in the first Parliament held after the Restoration. He had an only son Alexander, who became the third Lord, and who died in 1691 leaving an only son Alexander, who succeeded him, and an only daughter Mary, who married John Forbes the younger of Monymusk. Her son Sir William Forbes Baronet, was the great-grandfather of Sir John Stuart Forbes, the eighth Baronet of the Monymusk family, who made claim to the Dignity of Lord Forbes of Pitsligo and had an elaborate and learned case prepared in support of his claim. He died on the 27th of May 1866 leaving an only daughter Harriet Williamina, who married in 1858 Charles Henry Rolle, the present Lord Clinton, and died on the 4th of July 1869. Her son, the Honourable Charles John Robert Trefusis, is now the heir of the heir male of the first Lord Forbes of Pitsligo. Alexander the only son of the third Lord, succeeded his father as the fourth Lord in 1691 and took his seat in Parliament on the 24th of May 1700 as Lord Pitsligo. He took the part of Prince Charles Edward in 1745, and was attainted by an Act of Parliament in 1746, in which he was described as Alexander Lord Pitsligo. His estates having been seized by the Crown

as forfeited, he under the saving clauses of the Act, which authorized the Officers of the King to seize the estates forfeited in Scotland, insisted that he was not attainted by the Act of 1746, on the ground that he was not correctly described as Lord Pitsligo, his name of Dignity under the Letters Patent being Lord Forbes of Pitsligo, and not Lord Pitsligo. The Court of Session held that Alexander Lord Forbes of Pitsligo was not duly attainted by the description of Alexander Lord Pitsligo. The Lord Advocate on behalf of the King appealed to the House of Lords. The House called in the Judges, who expressed an opinion that as the description was not repugnant to the truth, although incomplete, there was a sufficient description, but they certified only to the House that if the Lords were satisfied that the Respondent was the person intended to be attainted by the Act, he was sufficiently described and well attainted by it. The House held that he was sufficiently described, and reversed the decision of the Court of Session. (Foster's Crown Law, p. 79.) The attainder having been upheld, the Dignity of Lord Forbes of Pitsligo was forfeited, in so far as the Attainder extended to the destination in favour of the heirs male of the body of Alexander the first Lord Forbes of Pitsligo; but the substitutions in favour of the heirs of the bodies of the heirs male, and in favour of the heirs male whomsoever, of Alexander are apparently distinct substitutions, and as such might, according to the decision of the House of Lords in the Gordon of Park case, protect the persons entitled to claim under them from the effect of the forfeiture caused by the Attainder of 1746. The attainted Lord died in 1762. His only son John the Master of Pitsligo died without issue in 1781, and in his person all the issue

male of Alexander the first Lord Forbes of Pitsligo became extinct. In case the Dignity should be held to be saved from forfeiture by the substitutions in favour of the persons entitled to claim under them, or in case the Dignity should be restored by the grace and favour of the Sovereign, it would vest either in the Honourable Charles John Robert Trefusis as the heir of the heir male of the body of the Grantee or in the collateral heir male of the Grantee. The family of Forbes of Boyndlie appears to have become extinct, and it is stated that Sir Charles John Forbes of Newe in the county of Aberdeen Baronet, is now the collateral heir male of the first Lord Forbes of Pitsligo. He derives his descent from William Forbes of Dauch and Newe, the second son of Sir Alexander Forbes of Pitsligo and the younger brother of Sir John Forbes of Pitsligo, the direct ancestor in the fifth degree of Alexander the first Lord Forbes of Pitsligo.

THE TITLES OF VISCOUNT OF FRENDRAUGHT AND LORD CRICHTON.

The Viscounts of Frendraught descended in the male line from the Lords Crichton of Crichton. William Lord Crichton, who was attainted in Parliament in 1483-84 for adherence to the Duke of Albany against King James the Third and deprived of his Peerage, was the ancestor of the Crichtons of Frendraught. James Crichton, in the lifetime of his father James Crichton of Frendraught, was by Letters Patent dated at Nottingham on the 29th of August 1642 created Viscount of

Frendraught and Lord Crichton, to hold to him and his heirs male and successors. He had two sons, James his successor, and Lewis afterwards the fourth Viscount. He fought with the Marquess of Montrose at the Battle of Invercharron, where the Marquess was defeated, and was taken prisoner and died immediately afterwards. James the second Viscount died in 1678 leaving an only son, William the third Viscount, who was an infant at the time of his father's death; and on the 4th of December 1678, his uncle Lewis Crichton was served Tutor at Law to him. The third Viscount died during his minority and was succeeded by his uncle Lewis, who then became the fourth Viscount. He followed King James to France, and a Decreet of forfaulture was pronounced against him by the Parliament of Scotland in 1690. He afterwards accompanied King James to Ireland and died without issue at St. Germains on the 26th of November 1698. If the Dignity should be restored, the collateral heir male of the first Viscount would be entitled to it. The first Viscount had three younger brothers, William, George and Francis, but no issue has been traced from any of them. James Crichton, the grandfather of their father, had a younger son George, and Gavin, a brother of William the attainted Lord Crichton, had two sons, James and William. Sir James Crichton, the son and heir of William Lord Crichton, on the 19th of November 1535 made an entail on failure of his own issue male in favour of George Crichton, the grandson of Gavin the brother of William Lord Crichton in tail male, whom failing, to James the second son of Sir John Crichton of Strathurd and Robert his brother in tail male, whom failing, to Martin Crichton, the brother to James Crichton of

Cranston Riddel in tail male, whom failing, to James the son of John Crichton of Innernaty in tail male. All these destinations appear to have been made in favour of male branches of the family, known to the Settler to be his Relations in the male line. It appears, therefore, extremely improbable, although no claim has hitherto been made, that the heirs male of the first Viscount should be extinct; and if the effect of the Decreet of forfaulture of 1690 were removed, the heir male of the family, if there be an heir male, would be entitled to the Dignities of Viscount of Frendraught and Lord Crichton.

THE TITLES OF EARL OF KILMARNOCK AND LORD BOYD.

The Dignity of Lord Boyd is a very ancient Honour, and it is stated that Robert Boyd of Kilmarnock was created a Peer before 1459. It is certain that he sat in Parliament as a Lord of Parliament on the 14th of October 1467 and on the 12th of January following. There is no record of the creation, and it was probably made without writing. According to the decisions it must be held that the Honour was destined to the heirs male of the body of the Grantee. Thomas Earl of Arran, the eldest son and successor of Robert Lord Boyd, was attainted and died abroad. The Earl's only son James Boyd, died without issue in 1484, and the Dignity was restored in 1536 to Robert Boyd the eldest son of Alexander Boyd, who was the second son of Robert the first Lord Boyd, and in 1549 Robert obtained a Charter from Queen Mary fully restoring

him to all the Estates, Honours and Dignities which had been held by the deceased Robert Lord Boyd, his grandfather. The Dignity descended in a regular line of male succession through four generations to William the ninth Lord Boyd, who was created Earl of Kilmarnock by Letters Patent on the 7th of August 1661, to hold to him and his heirs male for ever. He died in March 1692, and his son and successor William the second Earl, died in the following month of May. The second Earl left issue two sons, William who succeeded him, and Thomas who appears to have died without issue. William the third Earl resigned his Dignities and Estates into the hands of Queen Anne, and on the 22nd of January 1707 obtained a regrant of them upon the Resignation, and by the regrant the Honours were destined to the Earl and the heirs male of his body begotten or to be begotten, whom failing, to his eldest and other daughters successively without division, and the heirs male of their respective bodies, whom failing, to the Earl's brother Thomas Boyd and the heirs male of his body, whom failing, to any heirs of entail named or to be named by the Earl, and on failure of such nomination or destination, to the nearest heirs and assigns of the Earl; and the Earl's Estates were destined in the same manner. The Earl died in 1717, apparently without having exercised the power of nomination given to him by the Charter of Queen Anne, and he was succeeded by his only son William. William the fourth Earl joined Prince Charles Edward in 1745, was taken prisoner after the Battle of Culloden, brought to London and tried before the Lord Steward and House of Lords for High Treason and convicted. He was beheaded on Tower Hill on the 18th of August 1746.

Upon his conviction all his Honours were forfeited. The attainted Earl married Lady Anne Livingstone, (the only daughter of James Earl of Linlithgow and Callendar by Lady Margaret Hay, the daughter of John the twelfth Earl of Erroll,) who died on the 16th of September 1747. By her he had three sons, James Lord Boyd, Charles and William. James Lord Boyd on the death of his grand-aunt, Mary Countess of Erroll, the elder sister of his grandmother Lady Margaret Hay, Countess of Linlithgow and Callendar, succeeded under the then ruling entail to the Dignity of Earl of Erroll and as Lord High Constable of Scotland. He died in 1778, being then one of the Representative Peers for Scotland, leaving two sons, George who succeeded him, and William who on the death of George became Earl of Erroll. George the fourteenth Earl of Erroll was elected a Representative Peer for Scotland in 1796, and the Earl of Lauderdale having protested against the Election on the ground that George was not *de jure* a Peer of Scotland, controverting the sufficiency of the entail under which he assumed the Title, the matter came before the House of Lords, and on the 19th of May 1797 the House confirmed the right of the Earl of Erroll and found that he was duly elected. The Earl of Erroll died without issue on the 14th of June 1798, and was succeeded by his brother William Boyd as the sixteenth Earl of Erroll. William George, the son and successor of William the sixteenth Earl, became on his father's death in 1819 the seventeenth Earl, and was in 1831 created a Peer of the United Kingdom as Lord Kilmarnock. He died in 1846 leaving a son William Henry, the present and eighteenth Earl of Erroll and High Constable of Scotland, who is now the heir male of the

body of William the third Earl of Kilmarnock, and who would be entitled to the Dignities of Earl of Kilmarnock and Lord Boyd if the bar created by the Attainder of 1746 were removed.

THE TITLES OF VISCOUNT OF KILSYTH AND LORD CAMPSIE.

The family of Livingstone Viscounts of Kilsyth were descended from Sir William Livingstone of Kilsyth, the eldest son of Sir John Livingstone of Callendar by his second wife, Sir John having been the ancestor of the Earls of Linlithgow and Callendar by his first wife. Sir James Livingstone, the eighth in descent from Sir William, was created Viscount of Kilsyth and Lord Campsie by Letters Patent on the 17th of August 1661, to hold to him and his heirs male. He died in London on the 7th of September following leaving two sons, James and William, who successively held the Dignity of Viscount Kilsyth. James the second Viscount died unmarried in 1706, when the Dignity devolved upon his brother William the third Viscount. He was elected one of the sixteen Representative Peers in 1713, but took part in the Insurrection of 1715, for which he was attainted by the Act of Parliament of the 1st of George the First, Chap. 42. He died at Rome in 1733 without surviving issue. It would appear that on the death of the third Viscount all the issue male of his great-great-grandfather, William Livingstone of Kilsyth who died shortly after 1563, became extinct, and it is to be in-

ferred from a Charter making an entail of the estate of Kilsyth, granted to William on the 19th of June 1563, that William was an only son, as after the destination in favour of his male issue a substitution is made in favour of his uncle Alexander Livingstone. William Livingstone, the father of the last-named William, was killed at the Battle of Flodden Field on the 9th of September 1513. He certainly had a brother named Alexander in whose favour the substitution was made by the Charter of 1563. If there be male issue from Alexander in existence, the representative of such issue would apparently be the heir male of the Viscounts of Kilsyth. William Livingstone of Kilsyth the grandfather of Alexander had two younger sons, James of Inches, from whom descended Sir Thomas Livingstone, who was created Viscount Teviot in 1696, and who died without issue in 1711, when his Peerage became extinct, and Robert Livingstone of Baldoran, who was living in 1545, and if there be no male issue from Alexander, the heir male of the body of James of Inches or of Robert of Baldoran would apparently be now the heir male of the Viscounts Kilsyth. If there be no issue male from Alexander or from James or from Robert, the issue male of Sir William the first of Kilsyth would appear to have failed, and in that case the male representation of his family must be sought in the male representatives of his immediate elder brothers, John and Robert, the third and second sons of Sir John Livingstone of Callendar by his first wife. So long as there is issue male from Sir John Livingstone of Callendar, the father of Sir William the first of Kilsyth, in existence, the heirs male of the Viscounts of Kilsyth cannot be extinct.

THE TITLES OF EARL OF LINLITHGOW AND LORD LIVINGSTONE.

The Title of Lord Livingstone appears to have been created before the 30th of August 1458, as on that day King James the Third granted a Charter of the Barony of Callendar to James Lord Livingstone, and subsequent Charters were granted to him and his son and successor by the style of Lord Livingstone, but the name of Lord Livingstone has not been found amongst the Lords of Parliament in the Acts of Parliament of Scotland previously to the year 1525. There is no record of the creation, and the Dignity was probably conferred by Belting or Investiture and without writing, and according to the decisions it must be held to have been destined to the first Peer and the heirs male of his body. James Livingstone the first Lord Livingstone died about the year 1467. He had two sons, James who succeeded him, and Alexander who died in his elder brother's lifetime, leaving a son John, who succeeded to the Dignity on the death of his uncle James. James the second Lord Livingstone obtained a grant of lands from the King on the 30th of January 1499-1500 by a Charter of that date, wherein he is described as James Lord Livingstone (*e*). On his death without issue the Dignity descended to his nephew John. John the third Lord Livingstone had two sons, William who succeeded him,

(*e*) James Livingstone sat in Parliament on the 1st of October 1487 and on the 11th of January 1487-88, and on both occasions he was not ranked amongst the Lords of Parliament, but placed as Sir (Dominus) James Livingstone amongst the Territorial or Lesser Barons, from which it might be inferred that he had not then acquired the Dignity of a Lord of Parliament.

and Alexander the ancestor of the family of Livingstone of Glentirran, which family is said to be extinct in the male line. John the third Lord died before the year 1510, and was succeeded by his elder son, William. William the fourth Lord had succeeded before the 3rd of February 1509-10, as on that day the King granted a Charter to his only son Alexander, wherein he was described as Alexander Livingstone the son and heir apparent of William Lord Livingstone. Alexander succeeded to the Dignity before the 21st of April 1518, as on that day a Crown Charter was granted to him by the description of Alexander Lord Livingstone. He sat in Parliament as a Lord of Parliament. Alexander the fifth Lord had three sons; John the Master of Livingstone, who was killed at the Battle of Pinkie in 1547, and who died without issue; William who succeeded his father; and Thomas of Haining, the ancestor of the Livingstones of Haining, the heir male of which family would appear to be now the heir male of the Lords Livingstone, if the family of Livingstone of Westquarter be extinct. Alexander the fifth Lord Livingstone attended Queen Mary to France in 1548, and died in that Kingdom in 1553. William the sixth Lord had, with two sons who died in infancy, three sons who survived him. Alexander the eldest son succeeded him. Sir George of Ogleface the second surviving son was the ancestor of the family of Livingstone of Ogleface, which subsequently succeeded to Westquarter, and were thereafter described as the Livingstones of Westquarter, and the Westquarter branch appears to have become extinct in the male line on the death of Sir Thomas Livingstone of Westquarter in 1853. The third surviving son Sir William Livingstone of Westquarter had issue, but it failed in the male line, and

upon that event Westquarter descended to the then Livingstone of Ogleface, who thereupon became Livingstone of Westquarter. Alexander the seventh Lord Livingstone was created Earl of Linlithgow in 1600. The Letters Patent granting the Dignity were not entered in the Register of the Great Seal, nor is the destination of the Honour known, and in the absence of evidence of their contents, the presumption according to the Law of Scotland would be, that it was a destination in favour of the heirs male of the body of the Grantee. The first Earl of Linlithgow had three sons, John who died unmarried in his father's lifetime, Alexander who became the second Earl, and James created Lord Livingstone of Almond in 1633, and Earl of Callendar in 1641. (See the Title of Earl of Callendar, page 124.) Alexander the first Earl died in 1622. Alexander the second Earl of Linlithgow had two sons, George who succeeded him, and Alexander who on the death of his uncle under a special substitution in his favour, became Earl of Callendar, and who died without issue in 1685. George, who on the death of his father became the third Earl of Linlithgow, succeeded to the Title before the Restoration of King Charles the Second. He had two sons, George who succeeded him, and Alexander, who under a special destination succeeded as the third Earl of Callendar. The third Earl of Linlithgow died in 1690, and his son and successor George the fourth Earl, died without issue in 1695. On the death of George, his nephew James the son of his brother Alexander Earl of Callendar succeeded to the Dignity and became Earl of Linlithgow and Callendar. Alexander died in 1692 and was succeeded by his only son, James Earl of Linlithgow and Callendar. James Lord Livingstone, the only son of Earl

James, died without issue in 1715, and on the death of the Earl, the issue male of the first Earl of Linlithgow appears to have failed, and the Dignity of Earl of Linlithgow, had it not been forfeited, would have become extinct, if the destination of that Honour be held to have been a destination to the heirs male of the body of the Grantee. James Earl of Linlithgow and Callendar was attainted of High Treason by Act of Parliament in 1715, and the Honours of Earl of Linlithgow and Lord Livingstone were forfeited by the Attainder. If the bar created by the Attainder were set aside, the heir male of the family would be entitled to the Dignity of Lord Livingstone. The position of the family is stated in the Article on the Title of Earl of Callendar.

THE TITLES OF EARL MARISCHAL, LORD KEITH AND LORD ALTRIE.

The family of Keith held the Office of Marshal of Scotland in hereditary succession previously to and from the time of William the Lion, and the then Representative of the family was one of the first Barons of Scotland on whom the Dignity of a Lord of Parliament was conferred. William the then Marshal of Scotland is described in a Charter dated on the 20th of May 1442 and confirmed by the King on the 28th of October 1444 as William Lord Keith, Marischal of Scotland, and he sat in Parliament on the 26th of October 1451 as William Lord Keith the King's Marischal. He was created Earl Marischal before the 4th of July 1458, as he is described by that Title in an Exchequer Roll relating to the Shire of Kincardine under that date, and

the Acts of Parliament of Scotland show that he sat in Parliament as Earl Marischal on the 14th of October 1467. No record of the creation of the Dignity of Earl Marischal is in existence or appears to have been at any time known and the Honour was most probably conferred by Belting or Investiture and without writing. According to the decisions the descent must be held to have been limited to the heirs male of the body of the first Earl, and the succession to the Dignity is in conformity with the legal presumption. The first Earl died before the year 1476. His eldest son died in his lifetime leaving a daughter Jean, who did not inherit any of the Honours of the family, and the Earl was succeeded by his second son William. The Earl had two sons younger than William, John Keith and Alexander Keith. William the second Earl Marischal sat in Parliament as Earl Marischal on the 1st of July 1476 and also in the first Parliament held by King James the Fourth after the death of King James the Third. He left issue four sons; first, William who succeeded him; second, Robert Keith; third, Alexander Keith of Auquhorsk, from whom there lately were descendants; and fourth, John Keith of Craig, from whom descended the family of Keith of Craig, the Representative of which, Colonel Robert Murray Keith, was Minister and Envoy to Dresden in 1768. William the third Earl sat in Parliament as Earl Marischal on the 28th of April 1491, and died about the year 1530. His eldest son Robert Lord Keith was slain at the Battle of Flodden Field in 1513 in the lifetime of his father, leaving two sons, William who succeeded his grandfather as the fourth Earl Marischal, and Robert Keith Commendator of Deer, who was the father of Andrew Keith, who was created

Lord Dingwall in 1587, and who subsequently died without issue. William the second son of the third Earl was slain with his elder brother at Flodden Field. He died without issue. Gilbert the third son of the Earl also died without issue. Alexander the fourth son of the Earl obtained by grant from his father the lands of Pittendrum and was the ancestor of the Keiths of Pittendrum, a family hereafter mentioned in this Article as the Representative of it was considered to have become the heir male of the house of Keith on the death of the attainted Earl Marischal. The third Earl was succeeded by his grandson William, who was Earl Marischal before the 27th of January 1531-32. William the fourth Earl had two sons, William Lord Keith who died in 1580, in the lifetime of his father, leaving four sons; first, George who succeeded his grandfather; second, William who died unmarried; third, Robert who died without leaving male issue; and fourth, John who died unmarried. Robert Keith the second son of the fourth Earl was Commendator of the dissolved Abbey of Deer, and was on the 29th of July 1587 created Lord Altrie for the term of his life, with a destination after his decease in favour of the Earl Marischal and his heirs male. Lord Altrie died without issue male before 1606, but he left two daughters; and on his death the Dignity of Lord Altrie and the lands granted by the Charter which created the Peerage of Altrie devolved upon the then Earl Marischal. The fourth Earl died in 1581 and was succeeded by his grandson George the eldest son of William Lord Keith. George the fifth Earl Marischal was Ambassador from King James the Sixth to the King of Denmark in 1589 in order to settle the contract for the marriage between

King James and the Princess Anne of Denmark. The Earl was twice married. By his first wife he had only one son, William Lord Keith who succeeded him. By his second wife he had two sons, James Keith of Benholm and John Keith who died without lawful issue. James of Benholm had no issue male, but left three daughters who became his Coheirs. George the fifth Earl died in 1623, and was succeeded by his eldest son William Lord Keith, who on his father's death became the sixth Earl Marischal. The sixth Earl had four sons; first, William Lord Keith who succeeded him; second, George who succeeded his brother William; third, Sir Robert Keith who died unmarried; and fourth, Sir John Keith who was on the 26th of June 1677 created Earl of Kintore and Lord Keith of Inverurie and Keith Hall to hold to him and the heirs male of his body. In 1694 the Earl of Kintore resigned his titles of Honour into the hands of King William and Queen Mary, and upon his Resignation obtained a regrant of them to hold to himself and his sons and the heirs male of their respective bodies in succession, whom failing, to the heirs male of the body of the Earl, whom failing, to the Earl's brother (the Earl Marischal) and the heirs male of his body, whom failing, to the heirs female of the bodies of the sons of the Grantee, the Earl of Kintore, whom failing, to the heirs female of his own body, the eldest daughter always to take without division, with subsequent substitutions in default of such issue. The first Earl of Kintore had an only son William the second Earl of Kintore, and on the death of his second son William the fourth Earl in 1761, who had succeeded his only brother John the third Earl in 1758, the issue male of the first Earl of Kintore became extinct, and the succession to his Dignities was suspended

during the lifetime of George the tenth Earl Marischal, in consequence of his attainder for high treason, but on his death the Dignity of Earl of Kintore and the other Honours held under the regrant of 1694 devolved upon Anthony Adrian the eighth Lord Falconer of Halkerton, the grandson of Lady Catherine Margaret Keith, the elder daughter of William the second Earl of Kintore and the wife of David the fifth Lord Falconer of Halkerton. The sixth Earl Marischal died in 1635, and was succeeded by his son William. William the seventh Earl Marischal had four daughters, who became his Coheirs. He died in 1661 and was succeeded by his brother George. George the eighth Earl Marischal died in 1694 leaving an only son William, who then became the ninth Earl Marischal and who sat in the Parliament of Scotland from 1698 until the time of the Union, and who was subsequently one of the Representative Peers. He had two sons, George his successor, and James Keith an Officer in the service of the King of Prussia, who was slain in the Battle of Hochkirchen on the night of the 13th of October 1758. He died unmarried. William the ninth Earl Marischal died in 1712 and was succeeded by his elder son George. George the tenth Earl Marischal, having joined the Earl of Mar in his Insurrection, was attainted by Act of Parliament in 1715, and by his attainder all his Dignities and his high Office of Marischal of Scotland were forfeited. He was subsequently pardoned, and an Act was passed in 1760 to enable him to inherit any estates which might thereafter descend to him, and under that Act he succeeded to the Kintore Estates on the death of his kinsman, William the fourth Earl of Kintore, in 1761. The tenth Earl Marischal was for many years in the service of the King of Prussia and

died unmarried at Potsdam in Prussia on the 28th of May 1778. The succession of the heir female to the Kintore Peerage established that the issue male of William the sixth Earl Marischal had failed: and it does not appear that there was any male issue from the fourth or the fifth Earls Marischal in existence after the death of the attainted Earl. It is stated that the last Earl acknowledged Alexander Keith of Ravelston, a descendant in the male line from Alexander Keith of Pittendrum the fourth son of the third Earl Marischal, as the person who would eventually become his nearest heir male; and the attainted Earl sold the lands of Dunottar, the antient inheritance of the Keiths, to Alexander of Ravelston in 1766. Alexander Keith, the fourth son of the third Earl Marischal, was infeft in the Barony of Pittendrum upon a precept granted by his father on the 11th of February 1513. William Keith the grandson of Alexander, through Alexander's son John, obtained upon a Resignation a new entail of the lands and Barony of Pittendrum in 1599. William Keith had two sons, Alexander who succeeded him, and William who was the ancestor of Alexander Keith of Ravelston. Alexander the elder son was the ancestor of the Keiths of Uras. His descendant Alexander Keith of Uras, Sheriff Depute for Kincardineshire, died in 1746 leaving two sons, Alexander who died young, and Robert Keith who, after having served in the Prussian Army, entered into the service of Great Britain and became Lieutenant-Colonel of the 3rd Regiment of Foot Guards. He died unmarried in 1780, and it is said that the Uras branch of the family became extinct in his person. The eminent Bishop Robert Keith, the Author of the Historical Catalogue of Scottish Bishops

and other learned works, was a member of the Uras family and died without issue in 1757. On the failure of issue male from Alexander Keith of Uras, in case there were such failure, the Ravelston branch became the Representatives in the male line of William Keith of Pittendrum, who obtained the Charter of the lands of Pittendrum in 1599. . William the second son of William of Pittendrum, and the younger brother of Alexander the founder of the Uras branch, had two sons, Alexander and Thomas. Alexander left two sons, James and Alexander, both of whom died soon after their father, and without issue. Thomas Keith their uncle, who survived, succeeded to them and died in 1698, leaving two sons, Robert Keith who was in the Army and who died without issue, and Alexander. Alexander Keith acquired the lands of Ravelston and died in 1751. He had only one son Alexander Keith of Ravelston, who obtained the lands of Dunottar from the attainted Earl Marischal in 1766. It is stated that after the death of the Earl, Alexander became the heir male of the Earls Marischal. He had four sons and died in 1792. Alexander the eldest succeeded his father at Dunottar and Ravelston. Robert the second son died, apparently unmarried, in the service of the East India Company. William Keith was the third son. George the fourth son died unmarried. Alexander Keith of Dunottar the eldest son appears to have been the heir male of the Earls Marischal, and the person who would have been entitled to the Dignities of Earl Marischal, Lord Keith and Lord Altrie, and to the Office of Marischal of Scotland, if his right of succession had not been barred by the Act of Attainder of 1715. Alexander married in 1811 Margaret the daughter of Laurence

Oliphant of Gask; of that marriage there was only one daughter who became the heiress of Dunottar and Ravelston. She married Sir William Murray of Ochtertyre Baronet, whose son Sir Patrick Keith Murray sold both Dunottar and Ravelston. William his younger brother married Marianne the daughter of James Rae Esquire, and died in 1803, leaving four sons, Alexander, James, William and John. The heir male of the Dunottar and Ravelston family appears to be the person entitled to the Dignities held by the Earl Marischal in case the Attainder of 1715 should be reversed.

THE TITLES OF EARL OF MIDDLETON, LORD CLEIRMONT AND FETTERCAIRN.

General John Middleton, having materially aided King Charles the Second during the Usurpation and in his Restoration, was on the 1st of October 1660 created Earl of Middleton, Lord Cleirmont and Fettercairn to hold to him and his heirs bearing the name and arms of Middleton. This destination was probably equivalent to a limitation to heirs male, as no heirs of General Middleton could by hereditary descent bear the name and arms of Middleton, who were not members of his family by male descent, but if the adoption or assumption of the name and arms by other heirs could be held to fall within the terms of the Letters Patent, then the heirs of line on assuming the name and arms might become entitled.

After holding very high offices in Scotland the Earl

of Middleton was appointed Governor of Tangier, and died there in 1673, leaving an only son Charles, who succeeded him. Charles the second Earl of Middleton followed King James the Seventh to France, and for that act a Decreet of forfaulture was pronounced against him in 1695, and by the Decreet all his Honours were forfeited. He died at the Court held by King James at St. Germains, and left issue two sons, John Lord Cleirmont and Charles Middleton, both of whom were taken Prisoners at sea in 1708, but after a short confinement in the Tower, they were allowed to return to France. No positive evidence in relation to them subsequent to their release under the condition of their departure for France, has been traced, but it appears probable that they did not long survive or leave issue. They had three sisters who were resident in France, and their marriages in France and the deaths of two of them in Paris are stated in Wood's Edition of Douglas's Peerage, in which work it is also mentioned that no trace of either Lord Cleirmont or his brother had been discovered. Had the title of Earl of Middleton or that of Lord Cleirmont been borne for any time in France, it must have been known in this Country, and several of the Works on the Nobility of France take notice of members of the British and Scotch Peerage, who in consequence of the Revolution resided in that Kingdom, but the Middleton family is not mentioned in any of them. Assuming that there is no male issue from Lord Cleirmont or his brother Charles in existence, the male representation of the family would be vested in the eldest male descendant of the second son of Robert Middleton of Caldhame, the father of the first Earl of Middleton, and failing issue from him in the eldest

male descendant of the third son of the same Robert, or failing issue from him in the eldest male descendant of the fourth son of Robert. It is stated in an additional article attached to the Edition of Douglas's Peerage of Scotland, edited by Wood and published in 1813, that Robert Middleton of Caldhame had three younger sons, Alexander, Francis and Andrew, of whom Alexander was the eldest, and that a Disposition of lands dated on the 29th of June 1635 was witnessed by Robert Middleton of Caldhame and Alexander his son. Alexander was Principal of King's College, Aberdeen, and died in 1686. He had seven sons. George the eldest son became Principal of King's College, Aberdeen, upon his father's resignation in his favour in 1681, and held that Office until the year 1717. He died in 1726, and had ten sons. The eldest and the third of the sons died in childhood, and save that the date of their baptisms are mentioned, no account is given in the additional article of the second, fifth, sixth, seventh, eighth or tenth of the sons. The fourth son, John Middleton of Seaton, was for many years the Representative in Parliament for the City of Aberdeen and the contributory Burghs, and he acquired by purchase the Barony of Fettercairn, which had been the property of the Earls of Middleton, and which was sold under a Decreet of adjudication passed in favour of the creditors of John Earl of Middleton, and the Barony was conveyed to John Middleton by a Crown Charter dated on the 26th of July 1738. George Middleton, the only surviving son, succeeded to Seaton and Fettercairn on the death of his father in 1739, and died without surviving issue in 1772. Robert Middleton, the ninth son of Principal George Middleton, was a Collector of Customs in Scotland, and had three sons, the eldest of whom was George, who was a Captain of the

Scots Brigade in the Service of the States of Holland, and Charles was the second of the sons. The additional article does not give the name of the third son. Charles Middleton the younger son was a very distinguished Admiral, and was created Lord Barham in the Peerage of the United Kingdom on the 27th of April 1805, with a limitation in favour of his daughter, in default of his issue male. He died without issue male in 1813, and was succeeded in his Peerage by his daughter, whose son and successor Charles Lord Barham was created Earl of Gainsborough in 1841. If there be no male issue from either of the brothers of Lord Barham, the male representation of the Earls of Middleton would apparently vest in the eldest male descendant of George Middleton, who died in 1726, and who was the father of the ten sons already referred to, and failing male issue from him, in the heir male of the body of his father, Alexander the Principal of King's College. It is not known whether Francis, a brother of Alexander, left issue, but it appears that there is no issue male in existence from Andrew the other brother of Alexander. John Middleton of Kilhill, the father of Robert Middleton of Caldhame, had an eldest son John Middleton, who appears to have died without issue, and a third son Francis, Robert having been the second son. Francis was living in 1636, and it is not known if he left issue male. John Middleton of Middleton, the grandfather of Robert, who exchanged the lands of Middleton for the lands of Kilhill, had a younger son Alexander Middleton, who was living in 1585, but it has not been ascertained if there be male issue from him in existence. It appears, however, very improbable that the male issue of the family should have become extinct, although the Representative has not been traced.

The Decreet of forfaulture pronounced against Charles Earl of Middleton was grounded on the Act of the 23rd of May 1693, Chap. 16, which made residence in France or in any of the dominions of the King of France after the 1st day of August 1693 High Treason. The Indictment alleged that the Earls of Middleton and Melfort, who were included in the same process, had assisted the King of France in his War against King William and Queen Mary, but the evidence given against them was confined to proving that they were both in France after the 1st of August 1693. The Decreet of forfaulture against the Earl of Melfort was reversed by the Perth Restoration Act, which was passed on the 28th of June 1853. If the Decreet of forfaulture against the Earl of Middleton were set aside, the collateral heir male of the first Earl, whosoever he may be, would be entitled to the Dignities of Earl of Middleton, Lord Cleirmont and Lord Fettercairn under the grant made by the Letters Patent of the 1st of October 1660, if, according to the true construction of the Letters Patent, it were a grant to the heirs male, but if it could be held that it was a grant to the heir of the Earl of Middleton on such heir assuming the name and Arms of Middleton, then the heir of line of the Earl would be the person who, on assuming the name and Arms, would be entitled. The second Earl of Middleton had three daughters. The eldest Lady Elizabeth married Edward Drummond, a younger son of James the fourth Earl of Perth, who was in 1695 created by King James the Seventh, after he settled in France, Duke of Perth, a Dignity never acknowledged in England. Lady Elizabeth, whose husband assumed the title of Duke of Perth in 1757, died without issue in 1773. Lady Mary, the second daughter of the second

Earl of Middleton married Sir John Giffard, and Lady Catherine, the third daughter, married Michael Comte de Rothe, a Lieutenant General in the French Service, but it has not been ascertained whether any issue from either Lady Mary or Lady Catherine be now in existence. The first Earl of Middleton had two daughters. There was no surviving issue from the elder of them, and the Earl of Strathmore and Kinghorne is descended from, and is the heir of line of, Lady Helen, the second daughter.

THE TITLES OF EARL OF NITHSDALE AND LORD MAXWELL.

The Dignity of Lord Maxwell appears to be as ancient as the introduction of Lords of Parliament into the Parliament of Scotland, and the Baron of Maxwell and Caerlaverock was probably one of the Barons on whom the Honour of a Lord of Parliament was first conferred. Herbert the first Lord Maxwell witnessed in Parliament the Charter creating James Hamilton a Peer on the 3rd of July 1445, and he and four other Peers were specially described as Lords of Parliament. Robert the second Lord Maxwell was present as a Lord of Parliament in Parliament on the 9th of June 1455, on the 14th of October 1467, on the 6th of April 1478, and on several other occasions. There is no record of the creation of the Title and it appears to have been conferred by Belting or Investiture and without writing. The presumption of law in Scotland is that an

Honour so created is descendible to the heirs male of the body of the Grantee, and in the Maxwell case this presumption is supported by the actual descent of the Peerage. The Title descended in regular succession from Robert the second Lord to Robert the sixth Lord Maxwell. The sixth Lord married Lady Beatrix Douglas, the second daughter and coheir of James the third Earl of Morton, and the elder sister of Lady Elizabeth, whose husband James Douglas succeeded under a new entail as the fourth Earl of Morton. Robert Lord Maxwell died on the 14th of September 1552, and his eldest son Robert the seventh Lord died in childhood before August 1553. After his death the Honour devolved upon his brother John, who became the eighth Lord Maxwell. James Douglas, who under the entail became the fourth Earl of Morton was from 1572 to 1578 Regent of Scotland. On the 1st of June 1581 he was tried for, and convicted of, being accessory to the murder of Lord Darnley, and was executed on the following day. After the execution of the Regent Earl of Morton, and in the year 1581, the King created Lord Maxwell Earl of Morton. The Honour was conferred without Writing, and apparently solely by Investiture(*f*). Lord Maxwell sat in Parliament as Earl of Morton on

(*f*) The only contemporary evidence of the creation is an entry in the Books of record of the Lyon King at Arms, of which a certified copy was produced from the Muniments of Lord Herries in the Herries Peerage claim. (Herries Minutes of Evidence, page 437.) The entry merely states that at Holyroodhouse on the 29th of April 1581 John Lord Maxwell was created Earl of Morton, Lord Carleill and Eskdaill &c. In the Nithsdale Letters Patent the creation is stated to have taken place in October 1581, but probably the creation was held not to have been completed until Lord Maxwell took his Seat in Parliament under it, and he did not sit as Earl of Morton until the 30th of October 1581.

the 30th of October 1581 and frequently afterwards. On the 29th of January 1585-86 the Attainder of the Regent Earl of Morton was rescinded, and thereupon Lord Maxwell dropped the title of Earl of Morton, and was styled solely Lord Maxwell. The King, however, declared in his subsequent Letters Patent that the grant of the Dignity of an Earl was not affected by the restoration of the heir of entail to the more ancient Title of Earl of Morton, although it became necessary in consequence of that restoration to change the name of the Dignity. Robert, then styled Lord Maxwell, was slain by the Laird of Johnstone and his followers on the 7th of December 1593. He had three sons, the youngest of whom James, died without issue, and John the eldest became the ninth Lord Maxwell. Although King James induced John to pardon the Laird of Johnstone and to make apparent peace with him, Lord Maxwell subsequently slew the Laird of Johnstone, for which murder he was tried and having been convicted, was subsequently executed. John Lord Maxwell died without issue. His next brother Robert, who from the time of the execution of Lord Maxwell was merely styled the Master of Maxwell, or the Honourable Robert Maxwell, was fully restored to all the Dignities and inheritance of the family by Letters Patent granted in 1618 and by subsequent Letters Patent granted in the following year. On the 29th of August 1620 King James granted Letters Patent to Robert Lord Maxwell, which after reciting the creation of his father as Earl of Morton in 1581 and that it was the King's pleasure that the Dignity of Earl should be maintained in Lord Maxwell's family according to the former creation, although to preserve peace between the family of Douglas Earl of Morton and that

of Lord Maxwell, as well as to conform to the usage of Scotland, which did not allow two Earls to bear the same name of Honour, it had become necessary to change the Title of the Honour, the King created Robert Lord Maxwell, Earl of Nithsdale, Lord Eskdaill and Lord Carleill to hold to him and his heirs male, with the precedence due to the creation of his father as Earl of Morton in 1581. (Minutes of Evidence on the Herries claim, page 88.) Ten Earls were created by King James between 1581 and 1620 and some of them having objected to the precedence granted to the Earl of Nithsdale, the King referred the matter to the consideration of the Privy Council of Scotland, and the Council, by their Decreet of the 11th of January 1621, determined that the Earl of Nithsdale was entitled to hold precedence from the grant of 1581 in conformity with the Letters Patent. (Herries Minutes, page 398.) Robert Earl of Nithsdale died in 1646 and his only son Robert the second Earl of Nithsdale, died unmarried in 1667, and on his death all the male issue of his great-grandfather Robert the sixth Lord Maxwell became extinct. Sir John Maxwell, the only brother of the sixth Lord, became Lord Herries by his marriage with Agnes, the eldest daughter and co-heir of William the third Lord Herries. He died in 1582. His son William the fifth Lord Herries died in 1603, and his grandson John the sixth Lord Herries died in 1631. John the seventh Lord Herries, the son and successor of John the sixth Lord, succeeded on the death of Robert Earl of Nithsdale to the Dignities of Earl of Nithsdale and Lord Maxwell as heir male. He died in 1677 and was succeeded by his son Robert. Robert Earl of Nithsdale died in 1696, and was succeeded by his only son William. William Earl of

Nithsdale was tried for High Treason at the Bar of the House of Lords on the 19th of January 1715-16, and was convicted, and he and five other Peers were sentenced to death on the 9th of February following. He escaped from the Tower, and died at Rome in 1744. By his conviction all his Honours were forfeited. His only son William Lord Maxwell died without issue male in 1776. His daughter and heir Winifred married William Haggerston Constable of Everingham, and the Attainder of 1715-16 was in 1848 reversed in favour of her grandson William Constable Maxwell, in so far as it affected the Dignity of Lord Herries, and on the 23rd of June 1858 the House of Lords resolved that the grandson was entitled to the Title and Honour of Lord Herries. He was the father of the present Lord Herries. On the death of Lord Maxwell in 1776, the male issue of John Lord Herries, who succeeded as Earl of Nithsdale in 1667, became extinct. The next younger brother of John Lord Herries was James Maxwell of Breconside, and he was the great-grandfather, through his second son Alexander of Terraughty, of John Maxwell of Terraughty, who on the death of Lord Maxwell in 1776, became the heir male of the Maxwell family. John Maxwell was on the 4th of June 1778 retoured as the then heir male of Robert Earl of Nithsdale. He died in 1814, and his eldest son Alexander Herries Maxwell died without issue in 1815. William his younger son died in 1789, leaving an only son John, who died unmarried in 1810. On the death of Alexander Herries Maxwell in 1815, the issue male of John the eldest son of Alexander Maxwell, the second son of James of Breconside, became extinct, and the heir male of William Maxwell of Carruchan, the third

son of Alexander, became the heir male of the Lords Maxwell. William Maxwell died in 1772. His son George in 1815 became the heir male, and his grandson William Maxwell of Carruchan in 1856 presented a petition to the Queen praying that the Attainder against William Earl of Nithsdale might be reversed, and that, on the reversal, his right to the Dignities of Earl of Nithsdale and Lord Maxwell might be admitted. He also prayed that his right to the title of Lord Herries might be admitted, but the House of Lords decided that the heir of line was entitled to the Dignity of Lord Herries. No proceedings were taken upon his petition in relation to the titles of Earl of Nithsdale and Lord Maxwell, and William Maxwell died without issue in 1863, and on his death the issue male of William Maxwell of Carruchan, the third son of Alexander of Terraughty, became extinct. It is said that there may be male issue from Charles the youngest son of Alexander of Terraughty in existence, although it does not appear that such issue has been traced beyond the sons of Charles. If there be such issue, their existence would bar the right of any more remote descendant to the Dignities of Earl of Nithsdale and Lord Maxwell, in case it should be Her Majesty's pleasure to permit the restoration of those Honours. If, however, it could be shown that the issue male of James Maxwell of Breconside, the son of John the sixth Lord Herries, and the brother of John the seventh Lord Herries, who succeeded as Earl of Nithsdale, had become extinct, it would appear that the male representation of the family would have to be traced from a younger son of Sir John Maxwell, Lord Herries, and Agnes Lady Herries his wife. Their second son was Robert Maxwell of Spottis, and he left a son Sir

Robert of Orchardton, who was created a Baronet in 1663, but this line appears to have become extinct before the failure of the male issue in the Terraughty family. The third son of John and Agnes, Lord and Lady Herries, was Edward Maxwell of Lamington, and Robert Maxwell of Breoch, is now the heir male of the body of Edward, and if the line of Terraughty be extinct, he would appear to be the heir male of the Lords Maxwell, and if the bar created by the Attainder of 1715 were set aside, would be entitled to the Dignity of Earl of Nithsdale and the ancient Honour of Lord Maxwell.

THE TITLES OF EARL OF SEAFORTH AND LORD KINTAIL.

Kenneth Mackenzie of Kintail was created Lord Mackenzie of Kintail by Letters Patent on the 19th of November 1609, and his eldest surviving son and successor, Colin the second Lord Mackenzie of Kintail, was created Earl of Seaforth by Letters Patent dated at Theobalds on the 3rd of December 1623, to hold to him and his heirs male. He died in 1633 and was succeeded by his next surviving brother George, who on the first Earl's death became the second Earl of Seaforth. William the fifth Earl, the great-grandson of George, was attainted by Act of Parliament in 1715, and his Honours became forfeited by the Attainder. Kenneth Mackenzie, his grandson, was created in 1766 Viscount Fortrose, and in 1771 Earl of Seaforth, in the Peerage of Ireland; but those Honours, on his death without issue in 1781, became extinct. The Seaforth estates on the death of the Earl devolved upon his cousin

Thomas Frederick Humberstone Mackenzie, the grandson of Alexander Mackenzie, the second and only younger son of Kenneth, the fourth Earl of Seaforth. Thomas Frederick was killed in Action in the East Indies on the 30th April 1783, when the estates and male representation of the Seaforth family descended to his brother Francis Humberstone Mackenzie, who was created Lord Seaforth and Baron Mackenzie of Kintail in the Peerage of Great Britain on the 26th of October 1797. Lord Seaforth's sons, having all died without issue in his lifetime, the Dignity granted to him in 1797 became extinct on his death in 1815. Lord Seaforth was the last descendant in the male line from Kenneth, the fourth Earl of Seaforth. The third Earl had a younger son John Mackenzie of Assint, and the second Earl had also a younger son Colin Mackenzie. The first Lord Mackenzie of Kintail had several younger sons. The heir in the male line from one of the younger sons of the family, if any such exist, would now be the Representative of the Seaforth family and entitled to the Peerage, if the Attainder were reversed. If there be no issue male of the first Lord in existence, the representation of the family must be sought in the heir male of a younger son of one of his Ancestors.

THE TITLES OF EARL OF WINTOUN AND LORD SETON.

The Lords Seton were Lords of Parliament from a very early period in the History of the Parliament of Scotland. George Lord Seton, called the first Lord, was present in Parliament as a Lord of Parliament on

the 14th of October 1467, on the 12th of January following, and on several other occasions. He died in 1479, and his only son died in his lifetime, leaving a son George, who succeeded his grandfather. From George the second Lord Seton, the title of Lord Seton descended in regular succession to Robert the sixth Lord Seton, who was created Earl of Wintoun, Lord Seton and Tranent, by a Royal Charter dated on the 16th of November 1600, with a destination to him and his heirs male. He had five sons; first, Robert who succeeded him; second, George, in whose favour Robert resigned his Honours and estates; third, Alexander, who, under a resignation and regrant, became Earl of Eglinton, and who was the direct ancestor of the present Earl of Eglinton; fourth, Sir Thomas Seton, who was the ancestor of the Setons of Olivestob; and fifth, Sir John Seton who died without issue male. The first Earl of Wintoun died in 1603, and on his death his eldest son Robert became the second Earl. Robert Earl of Wintoun, being incompetent from ill-health, resigned his Dignities and estates in favour of his brother George by a Procuratory of resignation, dated on the 26th of June 1606, and on the 28th of May 1607 a regrant, proceeding upon the resignation, in favour of George, was made by a Crown Charter, which was passed under a Royal Warrant signed by the King. The Instrument of resignation, which contains a full copy of the Procuratory, and the Crown Charter following upon the resignation, were put in evidence in the Annandale Peerage claim from the muniments of the Earl of Eglinton. (Annandale Minutes of Evidence, pages 527, 529 & 522.)

Robert the second Earl, who after his resignation was

styled merely Robert Seton, died without issue. In 1619, George the third Earl of Wintoun resigned all his estates together with his Dignities, in favour of his son George Lord Seton, reserving his own life estate therein. (Same Minutes, p. 534.) Lord Seton died in 1648 in the lifetime of his father, leaving an only surviving son George, who succeeded his grandfather. George the third Earl had by Lady Anne Hay his first wife, four younger sons, three of whom died without issue in his lifetime. Alexander the survivor was created Viscount Kingston on the 6th of February 1651, to hold to him and the heirs male of his body. The title of Viscount Kingston became extinct on the death of James the third Viscount, the then only surviving son of Alexander the first Viscount, about the year 1726. The third Earl had issue by Elizabeth Maxwell his second wife, four sons. Christopher and William, the two elder of the four were lost at sea in 1648 and both died unmarried. Sir John Seton, the third son, of Garletoun or Gairmiltoun, was created a Baronet on the 9th of December 1664, and died in 1686, leaving a son Sir George, who was served heir to his father on the 13th of October 1686, and who was attainted of High Treason in 1716 and died at Versailles in 1769. It is stated in Wood's Edition of Douglas's Peerage that male descendants from Sir George, the second Baronet, were living when that work was published, but it appears probable that the line has since become extinct, and, it is believed, no person has assumed the title of Baronet conferred upon Sir John of Garletoun for many years past. Sir Robert Seton, the fourth son of the second marriage of the third Earl of Wintoun, was created a Baronet in 1671, but died shortly afterwards

without issue, and on the 20th February 1672 his brother Sir John Seton, was served heir to him. The third Earl died in 1650, and was succeeded by his grandson George, who then became the fourth Earl, and he was under age when he succeeded to the Peerage. He went abroad during the Usurpation, but returned to England on the Restoration of King Charles and sat in the Parliaments held by him. The Earl resigned his Honours and Estates into the hands of the King, and on the 31st July 1686 obtained a regrant upon the Resignation. By the Charter making the regrant, the Dignities and Estates were destined to the Earl and the heirs male of his body, whom failing, to any person or persons to be nominated by him, and the heirs male of his, her or their respective bodies, and failing any nomination or the issue male of the persons nominated, to the Earl's heirs male, whom failing to his heirs and assigns whomsoever. It does not appear that the Earl made any Nomination. He died in 1704, and his only younger son Christopher died unmarried in the same year. The Earl was succeeded by his elder son George, who on his father's death became the fifth Earl of Wintoun. He took part in the Insurrection headed by the Earl of Mar, and was taken prisoner at Preston on the 14th of November 1715. He was tried for High Treason at the Bar of the House of Lords on the 15th March 1716, was convicted and sentenced to death, but he escaped from the Tower and died unmarried at Rome in 1749. By his conviction his Honours became forfeited. As his father did not execute any nomination under the Charter of 1686, the Dignities of Earl of Wintoun and Lord Seton would on the death of the fifth Earl have devolved upon his nearest heir male, if the right had not been

barred by the Attainder of 1716. Such bar however would apparently extend only to the issue male of the fourth Earl, as the subsequent heirs male and other heirs would take under a distinct and different substitution, and in fact under a new grant in their favour; and if the subsequent grant to heirs male on failure of issue male to the Earl and in default of a nomination by him fall within the decision of the case of Gordon of Park, or of the similar case of the Sinclair Peerage, decided by the House of Lords on the 25th of April 1782, then the Attainder of 1716 would not be a bar to the title of the heir male. If there be issue male from Sir John Seton of Garletoun, (the third son of the third Earl of Wintoun by his second wife, who, as previously stated, was created a Baronet in 1664,) now in existence, his heir male would be the heir male of the Earls of Wintoun, but if, as seems most probable, his male issue has failed, the Earl of Eglinton would appear to be the heir male of the House of Seton and entitled to all the Honours held by the Earls of Wintoun (*g*).

(*g*) The late Earl of Eglinton was on the 23rd of June 1859 created Earl of Winton in the Peerage of the United Kingdom, but the grant of that Honour in no manner affected the title to the Scottish Dignity of Earl of Wintoun. The late Earl of Eglinton was also served heir male general of George, the fourth Earl of Wintoun, in 1840.

APPENDIX.

TABLE OF CONTENTS.

No. 1.

A List of Claims to Peerages of Scotland referred to the House of Lords upon which Evidence has been taken, and which are reported.

1760–62	Cassillis	Paton, II., 55. Maidment.
1768–71	Sutherland	Maidment.
1785	Spynie	Maidment.
1797	Glencairn	Macq., I., 444. Maidment.
1806–12	Roxburghe	Wilson & Shaw, Sc. App. Cases, I., Appx., p. 1. Paton, V., 601.
1821	Strathmore	Wilson & Shaw, Sc. App. Cases, IV., Appx. V., p. 89. Bligh, VI., 487. Paton, VI., 645.
1837–38	Huntly	C. & F., V., 349.
1822, 1832, 1834 & 1843–48	Crawfurd and Lindsay	Cl., II., 534.
1830 & 1841–53	Perth	Cl., II., 865. Macq., I., 776.
1850–53	Montrose	Macq., I., 57, 401.
1847–55	Southesk	Cl., II., 908.
1848–58	Herries	L. R., Sc. App., II., 258. Macq., III., 585.

1834, 1837, 1839 & 1871	Airth	Nicolas.
1865–72	Breadalbane	L. R., Sc. App., II., 269. Macq., IV., 711.
	(See also *Campbell* v. *Campbell*, L. R., H. of L. Cases (Sc.), 182.	
1792–99 & 1872–5	Belhaven and Stenton	L. R., App. Cases, I., 278.
1867–75	Mar	L. R., App. Cases, I., 1.
1880–81	Dysart	L. R., App. Cases, VI., 489.

NOTE.—A manuscript copy of the Judgment in the *Moray case*, dated the 29th of April, 1793, is in the possession of the author. The Judgment in the *Erroll case*, dated the 19th of May, 1797, is printed in the Appendix (No. VIII.) to the Case of the Earl of Kellie on his claim to the Dignity of Earl of Mar, and the Judgment in the *Polwarth case*, dated the 25th of June, 1835, and that in the *Nairne case*, dated the 4th of August, 1874, are printed in the Appendix (Nos. XXVI. and XXIII.) to the additional case of Sir Frederic Johnstone on his claim to the Annandale Dignities. The three last-named Judgments are also given in this Appendix (Nos. III. IV. and V.)

A collection of the proceedings relating to the election of Peers for Scotland, from the 16th of January 1707 to the 29th of April 1788, was arranged and published in 1790 by William Robertson Esquire, one of the Deputies of the Lord Clerk Register for keeping the Records of Scotland.

A List of Claims to Peerages of Scotland referred to the House of Lords upon which Evidence has been taken, but which have not been reported.

1710–14	Dingwall.	1812–21	Airlie.
1723	Somerville.	1818 and 1831–35	Polwarth.
1723	Colville of Culross.	1830–35	Kellie.
1734	Duffus.	1833–39	Rutherford.
1733–35	Oxfurd.	1808, 1820–22, 1826, 1831 and 1837–43	Marchmont.
1747–48	Stair.		
1760–62	Stirling.	1825–31, 1845 and 1854–57	Lovat.
1761–62	Rutherford.		
1764	Athol.	1830 and 1856–58	Newburgh.
1768–73	Kirkcudbright.	1861–63	Dundonald.
1782	Sinclair.	1867–68	Kinloss.
1762 and 1777–82	Wigtoun.	1860–69	Balfour of Burley.
1787–90	Strathallan.	1762, 1808–16, 1868–70 and 1871	Borthwick.
1772 and 1791–93	Caithness.		
1791–93	Lindores.	1869–71	Dingwall.
1791–93	Moray.	1842 and 1873–74	Nairne.
1791–93	Napier.	1876–78	Lindsay.
1791–93	Newark.	1877	Breadalbane.
1791–93	Ochiltree.	1792, 1805, 1817, 1819–20, 1825–44, 1851, 1852 and 1875–81	Annandale (*a*).
1797	Erroll.		
1800	Fairfax.		
1812	Queensberry.		

(*a*) It is understood that this case will not be reported before the end of the current year.

Claims to Vote.

1790–93	Hopetoun.	1841	Stair.
1791–93	Kinnaird.	1848	Colville of Ochiltree.
1791–93	Selkirk.	1850	Colville of Culross.
1792–93	Dumblane.	1854–56	Saltoun.
1828	Morton.	1862	Dalhousie.
1830	Buchan.	1877	Loudoun.

A List of Claims to Peerages of Scotland referred by the Crown to the consideration of the House of Lords, upon which it does not appear that any proceedings were taken after the reference had been made.

1733–34	Holyroodhouse.
1762.....	Angus.
1769, 1771 and 1775	Lennox (Earldom of).
1778.....	Ross.
1812, 1819 and 1820	Banff.
1812.....	Findlater.
1819.....	Aston.
1821.....	Callendar.
1829 and 1830	Lennox (Dukedom of).
1831 and 1845	Panmure.
1832, 1838 and 1844	Duffus.
1832.....	Stirling (Petition).
1839.....	Buchan.
1840, 1870 and 1871	Strathern and Menteith.
1847.....	Preston.
1847 and 1849	Sutherland (Precedency).
1856 and 1857	Nithsdale.
1878.....	Halyburton of Dirleton and Ruthven of Ruthven.

Claims to Vote.

1862 ..... Elphinstone.

No. 2.

SUTHERLAND PEERAGE CLAIM.

21st March, 1771.

NOTES OF LORD MANSFIELD'S SPEECH (*a*).

THERE are three claimants to this title and dignity, viz. :—

1*st*, Mr. Sutherland of Forse, who claims as *heir-male* of William Earl of *Sutherland*, in 1275; and there is no doubt that he is the *heir-male*, having clearly proved his pedigree.

2*nd*, Elizabeth, the daughter and only child of the last Earl of Sutherland, and heir of the body, *i. e.*, *heir-general* of the Earl William, who lived in 1275.

3*rdly*, Sir Robert Gordon claiming as heir-male of *Adam Gordon*, whom, Sir Robert says, was created Earl of Sutherland, upon a resignation of the honour made into the hands of the Crown, sometime between June 1515, and October 1515.

When the petitions of these several claimants came to be supported by cases, and even down to the hearing at the bar, the dignity was considered by all parties as an antient one, and of which the limitations did not appear; the author of Lady Elizabeth's case, not pleading as a council (*sic*), but delivering it as his opinion as a judge. None of the claimants even had an idea of the existence of any instrument of creation. Sir Robert Gordon rests upon the presumption in law, that there being no evidence of the grant, the peerage must be presumed to stand limited to the heirs-male of the body of the person first ennobled. Says Lady Elizabeth, I answer this presumption by the *fact*, to wit that in 1514 the dignity actually descended to a *female*.

The cases have gone into a great deal of learning and matter; but the question comes, notwithstanding, to be the shortest and clearest case I ever saw.

(*a*) These notes are taken from a contemporaneous manuscript in the Author's possession, endorsed "Notes of Lord Mansfield's Speech in the Sutherland Peerage. Taken by T. Longlands, and revised by the Chief Baron then Lord Advocate, Council (*sic*) for Sir R. Gordon." A copy of these Notes is printed in the Appendix to Mr. Maidment's Report of the Sutherland case, page 33 to page 40, but there are some mistakes of importance in his print.

Where neither original creation or the limitations of a peerage appear, the presumption is to the *heir-male*, but always open to the *heir-female* to contradict.

It is very remarkable, that there is no law of peerage before the Union; not a decision by the King, or Parliament, or Court of Session, except one in the case of Oliphant, and all agree it was a very bad judgment; for there the Court found, that the mere resignation into the hands of the Crown of a peerage, *in favorem*, extinguished the dignity, leaving it to the will of the Sovereign to revive the peerage or not, at pleasure, which was certainly wrong. The only other question agitated before the Union, touching peerage, was the *Precedency cause*. The judgment there was not final. The Court clearly proceeded on a mistaken apprehension, that in 1514 no heir-male existed. The contrary now appears even that there were several families. Therefore, the judgments made in this House, upon the several questions, which have from time to time occurred respecting the Peerage of Scotland, are the only rules which can be depended on, for guiding in competitions of this nature. There is nothing in the books, or any thing quoted from them, relative to peerages, and yet certain things are known—certain rules established by custom, particularly that dignities were originally territorial,—that they followed the estate, as we find now in England—a manour to have a lord of the manour. The husband of a wife having a territorial dignity was seised thereof in courtesy. Another distinction likewise took place, that these dignities went by *service* to the person last seised, and thereby a sister of the *full*, let in to the exclusion of the brother by the *half*-blood. But they have been *personal* for centuries, the doctrine of *service* to the person *last seised* of course exploded, and the descent now taken from the person *first ennobled.*

I make this preface to show how very little positive law there is relative to peerage.

2nd, In the *Precedency cause*, the Court of Session would not presume a *female descent.*

In the case of *Lovat* in 1729, the question was taken up in the Court of Session, which certainly had no jurisdiction. The judgment went partly on a private award, which gave the estate on payment of a sum of money to Lord Lovat. It did not go on the investitures or limitations of the estate, but upon presumption of its being a personal dignity, and as such, the original limitation in

favour of *males*. At that time, politics and party mixed with the determination. Lord Lovat had the countenance of the Duke of *Argyle*, and the heir-general was protected by the Duke of Roxburgh. I remember I talked that matter over with Mr. Forbes and Mr. Dundas. Mr. Forbes would have lost his life to have supported the *male succession;* and Mr. Dundas was no less zealous for the female line. When Lord Lovat, after the Rebellion of 1745, was committed to the Tower, it was matter of much deliberation, how he should be proceeded against.—If as a peer, he might say he was a commoner; and if as a commoner, it was apprehended he would plead his peerage. I was of opinion, the true, solid ground, was the presumption for the *heir-male*. Accordingly, he was proceeded against as a peer, and he never thought proper to contest it.

Afterwards came the case of *Cassillis*, which was very fully and deliberately considered and attended to. The judgment there went on the general ground, that in an antient peerage, where neither instrument of creation nor limitation of the honour appeared, the legal presumption was in favour of the *heir-male* of the body of the person first ennobled; and that in all such cases, this presumption must operate until the contrary appear. Upon this rule of construction, and not upon the limitations of the investitures of the estate at the time when the family was ennobled, did the judgment proceed. It is true, however, that the investitures were mentioned as a circumstance in the scale for confirming the general rule. There was no difference of opinion respecting this part of the cause. I remember, indeed, a noble Lord, whom I don't see here, was of opinion, that the charter 1671, according to the custom of those days, carried the peerage and precedency with it, to the heir-general. The words struck me; but on a more careful examination of that charter, I discovered that it bore reference to a former one, dated in 1642, as containing everything intended to be granted by this later charter; and on looking at that earlier charter, I saw it never meant to pass, nor could pass, the peerage, being only a private charter of lands, without a royal signature or words applicable to a dignity. Lord Hardwick, therefore, was of opinion the charter 1671 could not carry the peerage. I was of the same opinion, and after this explanation, if I remember right, the noble Lord, who had first thought otherwise, at last concurred in opinion with us. I settled with Lord Hard-

wick the penning of the judgment, and we settled it with a view, that it might be a rule, so as to exclude all future questions. It was declared that Sir Thomas Kennedy had a right to the dignity of Earl of Cassillis, as heir-male descended of the body of David the first Earl of Cassillis; and also to the dignity of Lord Kennedy, as *heir-male* descended of the body of Gilbert the first Lord Kennedy. If the peerage had been adjudged to Sir Thomas Kennedy, because he was heir under the original investitures of the estate, some of your Lordships were too well acquainted with my Lord Hardwick's accuracy to suppose, that this ground would not have been stated in the judgment.

In the case of *Borthwick*, the Crown furnished the claimant with money to make good his title, and he had nobody to oppose him. I only stated the chasms in his pedigree, which put it off for a session. The next year he supplied his proofs. Judgment went of course for him the *heir-male*, in consequence of the former judgment in the case of *Cassillis;* and no regard whatever was had to investitures.

All the law of peerage is since Queen Elizabeth; many since the Revolution; and some in my own time.

I am very glad to find, that upon the nice discussion in this case, the judgment of Cassillis seems to stand on solid ground; and to have received additional strength from the thorough investigation which has been here made into the limitations and descent of antient peerages; insomuch, that I am now infinitely more convinced of the propriety and justice of that judgment.

It now comes out, that this Peerage of Sutherland is the only one subsisting at this day, which was created prior to 1274. That nine-tenths of those since are limited to heirs-male. Twenty of twenty-five limitations unknown are admitted to have gone to *heirs-male*. What comes out by going farther back does not satisfy me, that these more antient dignities did not go to *heirs-male*. Whenever the lord of an estate had an only daughter, he applied to the Crown, and the Crown gave it to *heirs-general*, notwithstanding the original limitation might be, and probably was to *heirs-male*. Nine of them appear in this case, and yet the probability is, that the original limitation was to *males*.

Before the reign of James I. of Scotland (that is, about 1424) most of the original creations are to *heirs-male*. It appears from a book, the author of which (Lord Kames) deserves very well

of the republic of letters, that the Earldom of Murray, in 1306, was granted to Randolph and his *heirs-male.* Another, *Carrick*, in 1270—Earldom of Wigton the same limitation in 1341—Fife in 1362—and Monteith in 1427—all to *heirs-male.* The Earldom of Ross stands in a particular situation. The first limitation is to heirs-male, but with a remainder over to *heirs-general.* It was very unnecessary to go over the ground were it not to show all these old instances strengthen this general presumption founded in law and truth, that in every original grant or constitution of a dignity, the first limitation was to *heirs-male.* If a contrary presumption was to take place, many claims would start up. In England, whenever a peerage went to *co-heirs*, it was in abeyance, and optional for the Crown to revive it. I take it by analogy in such a case, it went in Scotland to the eldest female.

But to return to the only question in this cause, whether Adam Gordon in 1515 was created Earl of Sutherland or not? I have been always of the same opinion, as some of your Lordships know. I never saw a clearer or plainer case. It is now established, that at this period there existed several male descendants of the body of William Earl of Sutherland, who lived in 1274. For besides *Sutherland* of Forse, Lord Duffus' family, and other branches which had come off the stock at later periods, were in being. The fact is agreed, that Elizabeth took the estate by descent, as heir to her brother; and that through her it transmitted to the succeeding heirs totally unconnected with any right flowing from her husband Adam. She is likewise found in possession of the dignity. Both have gone together in her descendants for upwards of 250 years.

The estate Sir Robert Gordon admits in her right; and his only ground for separating the dignity is an *assumed presumption*, that there must have been a creation of the husband. But why? I lay out of the case the service 1514, and infeftment 1515. The same observation occurs on that of her brother's service to his father; and in other instances, the service of her own grandson, in neither of which is the title of Earl given. The amount of all the other proofs is, that Adam Gordon was called Earl of Sutherland. He certainly took it according to the notions which then prevailed, (rightfully or wrongfully,) by his wife.

In both kingdoms, *personal* honours came in place of *territorial.* They assimilated by degrees—one crept in imperceptibly on the other. Some peers of this House were made Earls of a county—

keeping the idea by analogy—but still as *personal* honours, the territorial being worn out. In territorial dignities, the husband took by *courtesy*. At the coronation of Richard II., the Duke of Lancaster claimed as tenant by the courtesy. In the reign of Henry VI., the Earl of Salisbury claimed on the death of the Countess of *Salisbury* without issue. It comes down to the reign of Queen Elizabeth, as appears from *Collins*. It was only abolished in her reign, but it held before as law. There are many instances in Scotland of tenants by the *courtesy* before 1514. Adam Gordon could not be created without a *resignation*—a resignation from whom? one of the counsel put it from *Alexander* a bastard till this cause—how comes he to have anything to say? His right paramount to *John*—quite an imagination to set him up. The second counsel did not care to meddle with him, but put it on John's *resignation*—Impossible—there was then no King—*there could be no resignation executed after the resigner's death.*

The tradition and sense of the family that the dignity went to Elizabeth is very strong.

No argument or presumption can arise from the entries in Parliament. They were marked as they entered. But in 1606, there issued a commission for ranking the nobility, and how does this stand? The Peerage of Sutherland, though not far enough back, is ranked, as in respect of the old peerage; taking place of ten others, which, upon the supposition of a new creation, must have preceded. There could not be a new creation. In 1630, the family enter a protestation, complaining that they were not carried farther back. In 1630, Sir Robert Gordon's own ancestor wrote a book, wherein he mentions it as having come to Elizabeth. This being the case, it is impossible to doubt, that it did so—nor will a proof or presumption to the contrary be now endured or let in: and as there is no doubt, that women were capable to take it, it is a clear answer to the presumption relied on by Sir Robert Gordon. In this state of the case, I am extremely clear, and have always been of the same mind.

A doubt has arisen out of the additional case of Lady Elizabeth, which has given me much trouble. It is contended that the charter 1601, which grants the whole earldom, changing the holding from ward to *feu*, limits the honour as well as the estate to *heirs-male*. This plea is grounded upon the principles maintained, and facts stated in the additional case of Lady Elizabeth, for showing that

dignities were territorial, and transmitted by charters along with the lands. It was first struck out at the bar by Lord Advocate, and argued very ably by him, particularly in the reply; and it is impossible, upon the doctrine of Lady Elizabeth's additional case, not to give judgment against her. For if her doctrine is right, the charter 1601 carried the peerage. No answer was given to it by Sir Adam Fergusson, only that it was too modern; but he could not fix where to draw the line. Your Lordships will take great care, and consider it deliberately. Since the hearing, I sent to the agents of both sides to enquire whether there existed a resignation of an honour separate from the land, either in the same instrument, or in a separate instrument before the year 1601. None can be produced. Letters patent 1488 don't affect the antient earldoms. There are *two* instances decisive against Lady Elizabeth, on the foundation that the charter 1601 is a good conveyance. Boyd, in 1591, where it is said, in the additional case, that the honour descended to the *heir-male, because of the resignation of the barony.* "*Dominium et baroniam hæredibus masculis ratione talliæ.*" And in the Peerage of Moray, 1611, ten years after the charter 1601, the same argument occurs. I employed a good deal of thought on this matter, talked with the noble Lord near me within these two days, and doubted whether we should not allow the counsel to speak to it. With all due deference to the author of the case, I am now satisfied there is no foundation for his territorial principle. It certainly does not now exist, and no man living can say when it did exist. It clearly must have ceased before 1214, when lands came *in commercio*, and adjudication went against them. When the *comitatus* did not carry the honour, a charter ought to be held only a conveyance of the estate. I am now satisfied no inconveniences can arise from the negative of this hypothesis. It only supports the presumption of *male succession*. I thought it proper to mention this solution, but if your Lordships are any ways doubtful, you would no doubt choose to hear counsel to it.

I would propose to your Lordships to come to an opinion.

1*st*. The title, honour, and dignity of the Earldom of *Sutherland*, descended to Elizabeth, the wife of Adam Gordon, upon the death of her brother, John Earl of Sutherland, without issue, in 1514, as heir of the body of William, who was Earl of Sutherland in 1275, was assumed by the husband in her right—and from her descended to the *heirs-male*, who were also heirs of her body, down to the

death of the last Earl of Sutherland in 1766, without any objection on the part of the *male line* of the said William.

2*ndly*. That none of the charters produced affect the title, honour, and dignity of the Earl of Sutherland, but operate as conveyances of the estate only.

3*rdly*. That the claimant, Elizabeth Sutherland, has a right to the title, honour, and dignity of the Earldom of Sutherland, as heir of the body of William, who was Earl of Sutherland in 1275.

No. 3.

ERROLL PEERAGE CLAIM.

19th May, 1797.

THE JUDGMENT OF THE LORD CHANCELLOR (*Lord Loughborough*).

The Lord Chancellor.—The hearing upon this case has been long, the argument upon it has been ingenious, and the matter at issue is of great importance to the person whose right of Peerage is now in question. But it is also of very singular importance to the rights of all the Peers of Scotland who are much interested in it, and particularly on the grounds upon which the determination of this House shall be given.

A Petition was presented to this House alleging that the Earl of Erroll ought not to have been elected and returned as one of the Sixteen Scots' Peers, and stating as the point of law that the Earl of Erroll was not a Peer; and the conclusion from thence drawn was that, in case the Earl of Erroll was incapable, the Petitioner was then duly elected.

In the natural order, the second proposition was material to be first maintained, and the Petitioner proceeded to state objections to the Title, and call upon the Earl of Erroll to make good his right to the same.

It is proper for me here to draw your Lordships' attention to the actual condition of the present Earl of Erroll. He is the eldest son of a Peer who sat and voted in this House as one of the Representatives of the Scottish Peerage, and he himself has been elected into his father's seat. He takes his Title, therefore, by descent, and he is no usurper, or intruder, not having assumed the Title himself.

The Father, from 1758 downwards till the time of his death, enjoyed this Title without objection. He voted at several elections of Scots' Peers. At one of which, indeed, in 1771, an objection was made, not against his Title, but against his proxy, on account of informality. Soon after he succeeded to the Title he had an opportunity to produce himself in public at the Coronation of His

Present Majesty, where he claimed to walk as Great Constable of Scotland.

This Office of Constable may perhaps be distinct from the Title of honour, but never was separate from it, as far as can be traced from the Public Records; first, in the representation of the family when Lord of Hay, and afterwards when Earl of Erroll.

His claim to walk as Constable was examined, and after due examination was allowed. And it is worthy of particular remark that he claimed to walk as *James Earl of Erroll*, and in that character his claim was sustained. At a subsequent period he was elected one of the Sixteen Peers of Scotland, and sat and voted in this House without objection. This James, the Father of the present Earl of Erroll, did not assume the Title, but *de facto*, he took it by descent, by regular service to his Grand Aunt in 1758.

Nor did she (the Countess Mary) by usurpation assume the Title. In 1718 she was served heir of *provision* and of *taillie*, not of line, to her Brother, Charles Earl of Erroll. She enjoyed the Title or Dignity during her life without challenge, and at the only opportunity in her power of appearing publicly in that character, the Coronation of King George the Second, in 1727, she claimed and was allowed to walk as Grand Constable by her Deputy the Duke of Roxburgh. It is to be noticed that she too claimed as *Mary Countess of Erroll.*

Her Brother, Charles Earl of Erroll, succeeded to his Father in 1705, and by his general service, without controversy, vested himself with all his Father's heritable rights. His Father, John (formerly Sir John Hay of Killour), in 1671, appears in the character of Earl of Erroll. It comes to be material then to the present question to enquire by virtue of what right it was that Sir John Hay of Killour did present himself and take his seat in the Parliament of Scotland as Earl of Erroll.

It was stated in argument for the Petitioner, that Sir John Hay of Killour was the nearest heir male of Gilbert the preceding Earl of Erroll. This, however, was not proved. But I take this for granted, and I do not conceive it to be of material consequence. The question is, whether it was in that character or what other that Sir John Hay of Killour assumed the Title, took his seat in the Parliament of Scotland, and sat in it till his death. And now it is necessary for me to enter more closely into the argument.

For the Petitioner it was alleged that on the part of a person

claiming a Title of honour in the character of heir male, nothing was necessary to be done to enable him to take his seat in the Parliament of Scotland. On the other side it was contended that it was necessary for every Peer, not a Son and heir apparent of the immediate predecessor, to make up his Title by service before taking his seat.

Peerages, your Lordships know, were anciently territorial and annexed to lands. And they continued so in Scotland till a later period than they did in this country. In a Report made by the Judges of the Court of Session to this House in 1740, of the then existing Peerages in Scotland, it is stated that in that country Patents began to be used about the close of the 15th or beginning of the 16th century. When Peerages were territorial a service was unquestionably necessary by the law of Scotland. And this service proceeded in the usual manner by a Writ or Brief from Chancery, Inquisition and Retour.

It is clear, both from fact and argument that, from the period when Patents first began to be known, the service still continued in so strong a Degree that until the end of the 16th century the heir did not assume the Title of his predecessor till he had completed his right by service. These instances, given by one of the most accurate writers on the Law of Scotland upon these subjects (Sir David Dalrymple), go the length I have mentioned. The latest of these was in 1592, in the case of the Peerage of Sutherland. One of the Earls of that Title, before his service, is styled simply John Sutherland. But after completing his Title by service he takes the Title of Earl.

Nor did the practice cease at that period; but, whether necessary or not, a service continued to be the regular mode of assuming a Title of Dignity during the 17th century. This is admitted on all hands, and there certainly once was a period when a service was necessary.

Sir John Nisbet of Dirleton, Lord Advocate, and a writer of great eminence in the Law of Scotland, mentions that an heir in a Peerage who assumed the Title of dignity without a service incurred what in Scotland is called a *Passive Title*. It is known to many of your Lordships that a person in Scotland taking up the succession of his predecessor subjects himself to all the debts of that predecessor, unless he be served heir to him *cum beneficio inventarii*. Those persons, too, who behave as heirs to their pre-

decessor called in Scotland *Gestio pro hærede* are liable to the payment of his debts, and Sir John Nisbet of Dirleton gives it as his opinion that assuming a Title of Dignity was a *Gestio pro hærede.*

A little after his time, Lord Harcarse, a Collector of the Decisions of the Court of Session, shews us that this question was determined in that Court in the case of the Peerage of Marishall. The heir having assumed that title was sued as liable to the debts of the former Earl, and the Court, so late as 1681, found, however, that the heir was not liable. My only reason for mentioning this is to show the then situation of the Peerage of Scotland.

A service in every case continued to be practised during the 17th and 18th centuries, and is not yet discontinued. Indeed, I think it is proper that it should still be continued. But it was essentially necessary by the constitution of the Parliament of Scotland in the case of a collateral heir, or an heir of provision.

A right by Patent is an heritable right, and, by the Law of Scotland, it is not to lands alone that it is necessary to make up a Title by service; a service is also absolutely necessary to vest a person in other heritable rights. I except, however, the case of a son. He may do what a collateral heir cannot.

When we talk of a right passing in the blood, that may be very good language in the Law of England, but it is not known in the Law of Scotland. It is indeed obvious that previous to the Union some form must have been used to establish a collateral heir in the right of a Peerage claimed by him.

There is one very striking difference between the Parliament of Scotland and the British Parliament which it is remarkable was not stated in argument by either party at the Bar. In Scotland there was no distinct or separate House of Peers. The Lords and Commons sat together in one body, and of consequence the question of the rights or precedency of the Peerage could not be decided in the Parliament of Scotland, and in fact never was so decided. I will venture to say that no instance to the contrary can be produced; but all such questions were determined in the Court of Session. That this is true I will quote what is full evidence of the fact.

On the point of precedency King James the Sixth in 1606 appointed certain Commissioners to examine the claims of the Peers

of Scotland. And these Commissioners pronounced a Decree, according to which these Peers were to be ranked in a given order. No Act of Parliament followed upon this, and the reason specially given for it in the Decree is that it was only provisional, and to last only till the Decree should be given by the *Judge Ordinary*, which was the Court of Session. This is detailed in the question between the Earls of Crawfurd and Sutherland, with regard to precedency determined by the Court of Session in 1706.

In the Peerage of Glencairn, which is soon to come before this House, a question of precedency arose with the Earl of Eglinton, which was keenly contested before the Court of Session upon the subject of the Decree of Ranking which I have already mentioned. It began some time before the middle of the last century and continued till the time of the civil war, and it was afterwards taken up after the restoration.

Claims of Peerage were also tried and determined in the Courts of Law, of which the Peerage of Oliphant in 1633 is an instance. But there is still a more distinct instance at a very late period. Since the Union the Court of Session, not apprehending that the law had thereby undergone any alteration, proceeded to a long hearing on the question of right to the Peerage of Lovat, and, not doubting their jurisdiction, determined in favour of the heir male. This House afterwards, in the trial of Lord Lovat, proceeded against his Lordship upon the ground that this Title was accordingly in him. *I have no manner of doubt, however, that since the Union questions of peerage are only to be tried in this House.*

When a question incident to a Peerage was tried in the Courts of Law, certain set forms were adhered to. Where a matter of precedency was at issue, it was tried by an action of declarator. Where there were different claimants of the same peerage, it was determined by a competition of the different services. Services were therefore necessary to Peers where their titles could only be determined by them.

It is impossible that the Parliament of Scotland could admit A., claiming to be Earl of B., without some document on his behalf. If he claimed by Patent, the Patent must have been produced. The right to sit could not be a matter of notoriety, except in cases of heirs-apparent. Where the heirs were collateral or heirs of provision it was quite different. When an heir of such

a description claimed an honor, it was necessary for him to give some legal proof—a service—which was absolutely necessary to show that he was not an intruder.

Let us apply this reasoning to the case of Sir John Hay of Killour.

He, beyond a doubt, never served himself heir male of Gilbert. It was suggested by the Counsel for the Petitioner, that on account of the then existing Charters, Sir John Hay of Killour could not be served heir male. But this I conceive to be a mistake. He might have served himself heir to Gilbert under the ancient investitures; but *de facto* he did not.

He, however, had the Charter of 1674, proceeding upon the procuratory of resignation, and the Charter of 1666 granting a power of nomination, and the subsequent nomination by Earl Gilbert, in his favour, with his own infeftment to instruct his right to the title. And such right as Sir John Hay of Killour therefore had, he sat in Parliament by virtue thereof; and it passed regularly downwards to the present Earl of Erroll.

Upon this deduction of the possession of the Title, from 1674 to the present time, the Counsel for the Defendant raised two preliminary objections to the petitioner's argument. And if they made out either, they contended they had done enough for their client.

First, they contended that such a possession raised every presumption on the part of the Earl of Erroll to support his Title, and that it was to be presumed, even though they should not be able to give sufficient evidence of the fact, that everything necessary to be done in this Case to give validity to the Title had been done accordingly, and they gave instances of a Patent from the Crown being to be presumed, and even of an Act of Parliament being to be supported by presumption.

And Secondly, they contended that the right of a Peer of Scotland sitting in Parliament at the time of the Union cannot now be called in question.

The first of these propositions I assent to with this limitation, that if it appear that the foundation of a claim to a Peerage is evidently and clearly a bad one, there is then no presumption from the length of possession under it.

The second I do not assent to at all. I do not consider the Union as having given an indefeasible right to the Peers of Scot-

land then sitting in Parliament. In fact, several Peers have since that period been added to the number of those existing at the Union. I consider it to be a necessary effect of the Union that this House must have full cognizance of the rights of all the Peers of Scotland. But all argument from long possession in this case is, I think, to be laid out of the question.

I must here state to your Lordships an argument pressed with great force by Mr. Grant. He contrasted the situation of the Peers of England with the great hardships under which the Peers of Scotland lie if their Titles, after long possession, might be called in question. An English Peer claiming by descent cannot be called upon to make out and instruct his Title. In the case of Lord Willoughby of Parham it was proved that the Title had been usurped, and repeated attempts were made to try the case, but as long as a Lord Willoughby of Parham sat in this House by descent the matter could not be brought to an issue. But upon the death of a Lord Willoughby without descendants of his body, Colonel Willoughby entered his claim, and the Title was by this House adjudged to belong to him. The Peer of Scotland is in a different situation, any other Peer may impeach his Title as his representative in Parliament. This I state as a great hardship upon that body, especially from the very defective state of the Records in that country, and because I conceive that it may be a proper measure to relieve the Peers of Scotland from it, and to have it declared that in future the Title of a Peer clothed with possession is not to be disturbed.

Whatever inclination therefore I might feel to give every possible presumption to long possession, I cannot admit it against Evidence, nor can I admit it in the present case, because the Title of the present Earl of Erroll is set out distinctly and fully; your Lordships are aware of everything respecting it, and as such you must determine upon it.

I shall now, in as few words as I can, state to your Lordships what the Title of the present Earl of Erroll is. From its antiquity no Patent originally granting the honor can exist. The Petitioner in his Case states that Peerages are to be presumed to be made fees where the contrary cannot be proved, and for this he relies on the determination of the House in the case of the Peerage of Cassillis, which I myself know to be an authority for that position. I do not know whether that doctrine may or may not be extended

by the posterior searches which have been made at great length in the Records of Scotland. The position, however, is clear that this Title was anciently settled on heirs male.

The present Earl does not contest this. He claims by a new limitation, by a grant of the Title between 1666 and 1674. Gilbert Earl of Erroll in 1666, by regular form, altered the mode of descent by the ancient investitures. He resigned his Titles of Honor and estates into the hands of the Sovereign, and got a new Charter with every requisite formality limiting the Titles and estates—1st, to the heirs male of his body; 2ndly, to the heirs female of his body (which was an alteration of the ancient investitures); and 3rdly, to such person or persons it should please him at any time during his lifetime to nominate and design to be heirs of taillie in the dignity and estate.

In 1672 it appears that Gilbert executed a nomination, but it was afterwards revoked and annulled, and in February 1674 he executed another nomination which was followed by a Procuratory of Resignation, upon which a Charter was procured in March 1674. In the Procuratory and in the Charter Sir John Hay of Killour is the institute; and, accordingly, in that character after the death of Gilbert he took infeftment. The Charter and Procuratory sufficiently identify the nomination under which Sir John Hay of Killour claimed. The Procuratory follows the nomination, and the Charter the Procuratory, word for word.

A doubt was suggested on the part of the Petitioner, whether or not this was the *last* Nomination; but this doubt I conceive was removed by the acts which followed upon it. The Procuratory of Resignation upon this Nomination, which was dated the 21st of February 1674, and the Sasine by Sir John Hay of Killour, which was dated the 13th of March thereafter, and which ascertains that Earl Gilbert was then dead, clearly shew the Nomination in question to have been the last.

The questions then to be submitted to the determination of your Lordships are, first, whether the Nomination of itself be sufficient to vest the Title; secondly, if sufficient by itself, whether the acts which were subsequently done give effect to it; and thirdly, whether the possession had under it be not sufficient for that purpose.

With regard to the first of these questions, it was argued to advantage by the Petitioner that a Nomination was a single

measure in itself, and not very consistent with the mode in which the power of the Crown should be executed. But to judge aright of this matter we must divest ourselves of all the ideas that are common upon this subject at the present day; we must go back to the period of time when such a practice did exist. I believe there are few instances in Scotland of ancient Peerages which have not at one period or other been resigned into the hands of the Crown. I am sensible that this could not now be done. Nothing short of forfeiture can defeat the rights of those having interest in the succession of a Peerage.

An attempt was made in this country to effect a similar purpose in the Case of the Peerage of Purbeck. A fine was levied to alter the succession, but this House determined that this could not be done. This however was not the case in Scotland. In that country not only were resignations common, but in the Appendix to the Report of the Judges of the Court of Session your Lordships will find not only many Patents of Peerage granted upon Resignations, but also Patents granted to heirs of entail and of provision, which was a common practice. Their Lordships tell us that they had not had time to make an accurate research; but out of 23 or 24 Patents they have given us, there are not less than five to heirs of taillie and provision. [Here his Lordship, from the Report before mentioned, quoted the cases of the Peerages of Coupar, Monteath, Duplin, Oxford and Seafield, with the dates of the Patents.] The last case is worthy of particular observation. The date of the Patent is so late as 1701, and the limitation was to the Patentee and the heirs of entail succeeding to him in his lands, baronies and estate. I must request your Lordships to remark who it was that obtained this Patent,—a lawyer of much eminence in Scotland, who, after filling several high offices in his profession, was afterwards Lord Chancellor of Scotland. I do think it would be difficult to maintain that a person of such a description was taking a nugatory Patent. And a Patent to heirs named or to be named was clearly tantamount to a power of nomination.

In the same period your Lordships will find six instances of Patents containing a power of nomination, either by a deed or by a will on death-bed, with or without conditions upon the nominee. In five out of the six your Lordships will find that the nominee has used and enjoyed the Title either in Parliament or out of it.

The first of these is the Earldom of Roxburgh. The Earl of Roxburgh in 1646 obtained a Patent granting him a power to nominate. It was objected on the part of the Petitioner that this Patent contained a *non obstanti* clause, and that otherwise the power to nominate would not have been legal. I looked into the Charter upon this point, but I found that the *non obstanti* clause does not apply to the honor, but to the lands. The Earl of Roxburgh nominated a younger son of the Earl of Perth to be his successor in the dignity, and he accordingly took up the Title, and sat upon it in Parliament. In this Peerage there was a subsequent Charter of Ratification taken out, which respected the lands only. And the occasion of this was that, the family having formerly held some of the lands from the Crown with a clause of reversion, these lands did accordingly so revert, and were granted by the Crown to Murray of Philiphaugh, then one of the Lords of the Bed Chamber, a well-known character and ancestor of the family of Dysart. The Earl of Roxburgh purchased back the reversion from Mr. Murray, and in making up the Titles it was deemed proper to take this last Charter from the Crown.

The second instance is the Peerage of Rutherford. In the reign of Charles the Second a Patent was granted creating Andrew Rutherford Lord Rutherford, to himself and the heirs male of his body, whom failing to any person or persons he should nominate *etiam in articulo mortis*. This Andrew being taken ill at Portsmouth, on his way to Tangiers, he executed a nomination there in favor of his brother Sir Thomas Rutherford. This Sir Thomas Rutherford was served heir of provision, and, without any controversy, sat in Parliament as Lord Rutherford. An objection was stated for the Petitioner that this nomination was contained in a will, and had strange and uncommon clauses for a deed of that nature. But in answer to this it appears to me sufficient that he was served heir of provision in virtue of it. Upon the inquest for this service there were the President of the Court of Session, the Lord Advocate and six of the Lords of Session. And I cannot but think that these persons were competent judges, and thought this a good nomination.

The third instance was the Peerage of Cardross. A power was given by Patent, in 1610, to the Earl of Mar to nominate a person to succeed to him in the Dignity of Lord Cardross. It was stated at the Bar that this was a peculiar case, being an erection of

Church lands. But the question with regard to Church lands had been at an end before this period. The Earl of Mar nominated his eldest son by his second marriage, who accordingly took the Title of Cardross, and sat in Parliament. The Title of Buchan afterwards accrued to the Title of Cardross. It was argued for the Petitioner that this nomination was a foolish paper, and that it reserved a life-rent to the Earl and Countess of Mar. But this life-rent only respected the lands.

Fourth—Breadalbane. The Patent creating the Earldom, in 1681, on account of some unhappy situation, as it said, of the eldest son of the Patentee, was granted to him with a power of nomination. The Patentee nominated his second son, who, after his father's death, assumed the Title. At an election in 1721 of the Peers of Scotland, an objection was made to the vote of Lord Breadalbane, that his eldest brother was alive. But it was answered that the Earl took in virtue of the nomination, and nothing further was done upon this objection.

Fifth—Maderty. By the Patent in this Title a power was given to nominate. A nomination was afterwards made and the Title taken up in virtue thereof, and a Charter thereupon taken out as in the Peerage of Erroll. When I mentioned that there were six instances I also included the Peerage of Stair, which I shall more particularly attend to afterwards.

Against these instances it was argued in general that the matters then done and practised had not been contested. But the inference thence to be drawn in favor of the Title of the Earl of Erroll is so much the stronger that they have not been contested. I quote instances from the reign of James the Sixth to that of George the First, and I think they clearly establish that the law was agreeable to the prevalent practice. It is the same thing in substance whether a power of nomination was given in a Peerage, or whether it was given to heirs of entail.

All that I want to establish my argument is for your Lordships to suppose that all the Crown Lawyers in Scotland and all the Officers of State understood something of the Law when they were passing Patents of honor containing such powers, and thought they were acting accordingly. Were the case otherwise, some instance of a nomination would have been rejected, or at least, questioned.

There is not much authority in the Scotch Law Books with

regard to matters of Peerage. But there is one respectable book, the report of the Scotch Judges, to which I have already alluded. In that report their Lordships meant distinctly to express that in their judgment a nomination was a valid mode of transmitting a Peerage, and that *per se*, and not upon the ground of its being confirmed by any subsequent Charter.

Towards the close of that Report their Lordships state that it was not only common to obtain grants of honor to the Grantee and his heirs male, and of taillie, referring to the particular entail then made, but also to heirs of taillie afterwards to be appointed, and nominees. "Now," they say, "as it is impossible to trace "through the Records, such nominations and appointments, which "in some cases *may be valid, though not hitherto recorded*, your "Lordships will easily see that the Lords of Session are not able "to give any reasonable satisfaction touching the limitation of the "Peerages that are still continuing," &c. Your Lordships will observe from this, that the Judges were of opinion that nominations not appearing upon record might still be valid, which was in other words saying that a nomination without a subsequent Charter might be valid, for if such Charter existed it would necessarily have appeared upon record.

The only answer to all this on the part of the Petitioner was his argument drawn from the case of the Stair Peerage (*a*). I must observe that this was treated in a very singular manner. The proposition founded on by the Petitioner in this case was not drawn from the Judgment, but from an argument contained in a printed Case for one of the Claimants; at which printed Case appear the names of *William Murray* and *Alexander Lockhart* (*b*). If I had been sitting in any other Court, where such an argument as that maintained by the Petitioner had been held, I would have stopped the Counsel. But, though such argument be stated in the printed Case, there is not from thence any sure conclusion to be drawn that it was the argument founded on by the Counsel at the Bar. It happens frequently that the argument in the printed Case may be totally relinquished. I remember a striking instance where this occurred at the Bar of this House, in a case of *Newton*

(*a*) The printed case of the Earl of Lauderdale in 1796, in the Erroll Claim (a copy of which is in the possession of the Author), gives the argument founded upon the *Stair case* at length.

(*b*) This is the case referred to in the Introduction in the foot note on page 8.

v. *Newton*, which is collected in Brown's Parliamentary Reports. The printed Case, on one side of which are the names of a noble Lord now near me (Thurlow) and of myself, was drawn by a person of great eminence for his legal knowledge and acuteness. The argument contained in it was extremely subtile, but it was quite wrong; and when we came to a consultation it was agreed to argue the case on different grounds, which was accordingly done. Lord Camden expressed his surprise at this, and we explained the matter to him.

The case of the Peerage of Stair I have often had occasion to discuss in times less remote, and I have seen notes of what passed, taken by Mr. Forester. I am surprised that neither party has suggested in any shape what really did take place upon that occasion; but I shall abstain from stating my own private knowledge on the subject.

But let us see what the Judgment in that case was. It simply declared "that the Nomination and Appointment, dated the 31st "of March 1747, made by John, Earl of Stair, to his Honors and "Dignities, was not valid in law." *No reason is stated, but the obvious reason was, because John in* 1747 *had no power to nominate.* It may be true that the Crown had not then a power to confirm a Nomination made. *But in* 1747 *no power on earth could create a Commoner a Peer of Scotland;* and to seek further than the obvious reason of this is like holding up a farthing candle to look for the sun. It was the effect of the Union to annihilate the power of making Scots Peers.

But the argument of the Petitioner that a nomination is not valid without a subsequent confirmation, is but loosely urged in the Stair case which he founds on. That case states that "*it was* "*apprehended* that no instance could be found where such power of "nomination had been effectually exercised without the concur- "rence and interposition of the Crown." But it was clearly a mistake that no instance could be produced to the contrary, for instances of that nature have been produced and are expressly mentioned to exist by the Report of the Lords of Session. This Report was an authority to which I know great attention was paid by Lord Hardwick. But his Lordship would have shuddered at the idea that the decision in the Stair case would have been given as a ground sufficient to have cut down ancient Peerages. But

the reason of this decision, as I have already said, is sufficiently obvious.

I come now to the second general point for your Lordships determination, that is, supposing a confirmation were necessary to a nomination, whether the nomination in the present case was duly confirmed? I am not to dispute the argument mentioned in the Petitioner's case on the case of Cassillis. But there was no such authority in that case as to support the doctrine he contends for. There was a mistake in relying upon Sir Thomas Kennedy's case. But, in the argument on behalf of the Earl of March at the Bar, it was contended that a Charter in 1671 was not effectual because the signature upon which it proceeded wanted the Sign Manual. But in that case, where such signature was an alteration of the ancient investitures, the want of the Sign Manual could be argued upon. The letter of instructions upon that point is perfectly clear.

Mr. Attorney-General objected that the King's Letter expresses the reason of it to be that the King must be informed of the new limitation. But in the present case, by the Charter of 1666, the King had already given his consent to an alteration of the limitation, and had given a power to nominate.

It was argued further that this nomination could have no effect of itself, that there must have been a Royal Signature to make it effectual, and, that till then, it was but a promise only. In my opinion, however, it was a *distinct consent* on the part of the Crown to change, and takes this case completely out of the provisions of the King's Letter. But a complete answer to the objections upon this head, is the case of *Cardross* (*a*), in which the Charter does not pass upon a Royal Signature, and the date of it is 1617, but two years after the date of the King's Letter.

Supposing, however, with the Petitioner, that a Royal Signature were necessary, what happened in the present instance could only be deemed to be a mistake. But the Signature, however, passed with the consent of all the Law Officers.

And upon this point I shall only say further, that from that circumstance, and from the care which it is to be presumed the persons who assisted the Erroll family would take in making up their Titles, I am loth to think myself wiser than them. I presume

(*a*) It perhaps should have been *Maderty*.

they followed precedents well known at the time, and that they were not all blunderers.

Thirdly, as to the effect of the sitting. I know of no mode by which a Peer sitting in the Parliament of Scotland could be turned out of Parliament.

Having treated the case thus at large, my opinion upon the result of the whole is, that if the present Earl of Erroll, instead of defending his Title had come into this House as a Claimant, I should have been of opinion that he had completely established his Title by production of the Charter of 1674, in which the nomination is mentioned, without any other document on his part, and though his right to the Title had not been fortified by possession.

I shall now move the Resolution which appears to me to be proper. I have had some considerable difficulty in settling the mode in which it should be framed. In the case of the Earl of Moray, whose Title was called in question, a Resolution was passed to sustain the Earl of Moray's vote. But this, in the present case, I do not think goes far enough. I therefore move your Lordships to resolve that George Earl of Erroll was duly elected.

No. 4.

POLWARTH PEERAGE CLAIM.

25th June, 1835.

THE JUDGMENT OF LORD LYNDHURST.

LORD LYNDHURST—

My Lords, I am also of opinion, that the Claimant has made out his case and that he is entitled to the Peerage which he demands at your Lordships' hands. It appears to me that the question altogether resolves itself into a very short point. First, with regard to the fact, the Claimant has proved most distinctly by his evidence the extinction of the heirs male of the body of the first Patentee; he has also proved that he is heir general of the last heir male, and by consequence of the first heir male of the body, and by consequence also of the Patentee. That is the position in which he stands.

Having proved the fact, then the question depends entirely upon the construction of the grant, and it appears to me, after attending to the arguments which I heard at the Bar, and after attending to the reasons of my noble and learned Friend (Lord Brougham), that the case is entirely free from doubt. The obvious construction of this grant, in the first instance, is a grant to the heirs male of the body with remainder to the heirs general. Now is there anything inconsistent in the grant of an honor of this description to lead your Lordships to suppose that it was improbable that such a grant was intended by the Crown? At the time when this patent was granted it was not unusual to grant dignities in fee—it was not unusual to grant dignities to the heirs male of the body, that is, dignities in tail. What then is there inconsistent in a grant by the Crown first of all to the heirs male of the body of the grantee, and, upon failure of heir male of the body of the grantee, then to heirs general? It is quite impossible to say that if those descriptions of grant are made this combined description of grant is improper.

Then, my Lords, as to the construction of the grant itself, do the terms warrant this interpretation? What are the principles upon which instruments of this description are interpreted? You must in the first place give to every term which is made use of its legal interpretation, unless it is obvious that the grantor intended to use the term in some other sense. You must also give to every part of the grant, if it will admit of a sensible construction, an effect. Those are the two principles that are always applied to the interpretation of instruments of this description, and of all legal instruments. Cases were cited at your Lordships' Bar for the purpose of proving those propositions. It is unnecessary to refer to them. It is unnecessary to cite any authority for this purpose, for those are the principles of common sense, applicable not only to grants by the Crown of Honors, but to all legal instruments whatever.

Those being the principles, what are the terms of the grant? First of all, it is to the Patentee and the heirs male of his body, and then to the heirs of such heirs. What is contended for on the part of the Crown is, that this is simply an estate tail—a grant to the heirs male of the body of the Patentee. That is what they contend for, but they cannot establish that without rejecting the subsequent words, "and to the heirs of such heirs," they must be entirely rejected as surplusage; but your Lordships will not reject them as surplusage if you can put a sensible construction upon them, according to the doctrines which I have stated.

Then they say that heirs of such heirs means heirs of the body of such heirs; but that interpretation cannot with propriety be adopted, unless it be necessary and obvious that the grantor so intended it, because the term "heirs" means, when it stands by itself, heirs general, and you cannot limit it to a particular description of heirs, unless it is absolutely necessary from the other circumstances in the grant.

It appears to me therefore, my Lords, that you cannot reject those words, and that you cannot put that limited construction upon them which is contended for on the other side, referring to the principles always applied to grants of this description. If that be so, then it follows that you must give to those terms their natural construction, namely, that after the termination of the estate tail the heirs of such heirs are to take—that is, the heirs general.

But then a difficulty has been suggested arising out of the term "et." My noble and learned Friend has argued, much to the pur-

pose, that there is no foundation for that difficulty; that it means nothing more than "quibus deficientibus"—upon the failure of the heirs male of the body then the limitation arises. The grant is to the heirs male of the body and to the heirs general What does that imply in the first instance? Obviously that it is an estate tail in the first instance, and upon the extinction of the estate tail there is a remainder in fee.

But, my Lords, we are not obliged to resort to argument, or to that which appears to be obvious, for establishing this principle, because the case that was cited at the Bar, and to which my noble and learned Friend has alluded, is precisely in point in this part of the case. That was a limitation to the heirs male and to heirs and assignees whatsoever. The word "et" there must be equivalent to the term "quibus deficientibus," and your Lordships in your decision in that case put that construction upon the term, and the case is precisely similar, as it appears to me, with respect to this point, to the present case, and that we must read "et" as "quibus deficientibus." I do not find, after looking minutely into that case, that with respect to this point I can draw any distinction between them.

With respect to the limitation in this case, it is to Patrick Hume and the heir of his body, whom failing to the heirs general. A question was put by a noble Lord during the argument to the Counsel with respect to the subsequent limitations to the heirs of such heirs, "Do you mean by that the heirs of the last heir in tail or of the first heir in tail?" The answer to that is simply this, that the heir in general of the last heir in tail is the heir general of the first heir in tail—so that the grant amounts to nothing more than this, the grant of a dignity in tail male with remainder in fee to the heirs of the body.

It appears to me therefore, my Lords, that there is no difficulty in the legal construction of this instrument; and if the Claimant has made out his case with respect to the facts so as to bring himself within the terms of this grant, which he has done, I think your Lordships will be of opinion that you ought to report to the House that he has established his claim.

No. 5.

Extracts from the Minutes of Evidence and Proceedings on the Nairne Peerage Claim, 7th of July 1873.

(*Minutes of Evidence on the Nairne Peerage Claim, pages* 3 *and* 4.)

THE Counsel being asked in whose possession the estates, which were intended to have gone with the title, now were,

Mr. Junner stated they had long since been forfeited, and that they were now in the possession of strangers; but he submitted that, according to the decisions in the Balfour of Burley and Kilwinning and in the Colville of Culross cases, it was not necessary that the estates should be in the possession of the Claimant.

The Counsel being further asked under which of the limitations in the Crown Charter the Claimant considered herself as coming, Mr. Pearson submitted that the heirs male having failed, the Claimant was entitled as the heir female of Robert, the second son of the marriage referred to in the Charter under the limitation, "the eldest daughter or heir female to be procreated between them "successively without division."

The Counsel being then asked whether it was proposed to prove the extinction of the issue of the daughters of the first taker, Mr. Pearson stated that it was not proposed to prove that, his contention being that the succession having passed to a male heir, the title would go to the heir female of that male heir before it reverted to the daughters of the first takers.

The evidence having been completed, and the case fully argued, the Lord Chancellor on the 4th of August, 1874, *put the following question to the Lord Advocate:—*

Do you wish to make any observation upon the question of law which was raised upon a former occasion?

To which the *Lord Advocate* replied:—I have merely to say that I have examined the authorities which have been referred to, and I see no reason to doubt the law as laid down in those authorities.

If those authorities are applicable, as I humbly venture to submit they are, to the present case, it appears to me that they tend to establish that the destination or limitation in the patent is in such terms as would entitle the Claimant to this Peerage.

The *Lord Chancellor* (Lord Cairns) then delivered the following Judgment:*—My Lords, this case is a very simple one, and the claim might have been disposed of a considerable time since, but that a question of some nicety arose upon the construction of certain words in one of the early instruments in the case, as to which construction some doubt was in the first instance entertained by your Lordships.

My Lords, as regards the Pedigree and the evidence in support of it, I have never entertained any doubt. It appears to me clearly to establish the claim of the Dowager Marchioness of Lansdowne, and with regard to the point which was most properly called to your Lordships' attention by the Lord Advocate it appears to me that, having regard to the lapse of time, and having regard to the absence of mention of any issue in the French documents connected with the decease of Thomas Nairne (a mention which, according to the practice in France, undoubtedly would have occurred if there had been any issue), and having regard to the evidence of Mrs. Sandeman and of Colonel Robertson, it may fairly be taken that Thomas Nairne died unmarried and without any issue.

My Lords, the nature of the question, which presented at first sight some difficulty, was this: The letters patent which created the Nairne Peerage referred for the terms of its devolution to the infeftments which were to be made of certain property which were to go along with the title and dignity. Of the same date as these letters patent, the Crown Charter contained the destination of the property in question, and the destination was this: The lands and barony of Strathurd were to go to Sir Robert Nairne, the judge, for his life, and to the heirs male to be lawfully procreated of his body, whom failing to Margaret Nairne, his only lawful daughter, and the heirs male to be lawfully procreated between her and Lord George Murray, youngest son of the Marquis of Athole, "whom "failing to any other son of the said Marquis procreated or to be

* This copy of the Lord Chancellor's Judgment is taken from the Shorthand Writer's Notes.

"procreated of his body, the eldest born excepted, whom Margaret "Nairne might marry, and failing heirs male to the eldest daughter "or heir female to be procreated between them successively with-"out division."

Now what happened was this: Margaret Nairne did not marry Lord George Murray, but she married a younger son of the Marquis of Athole, Lord William Murray, and the male issue of that marriage—that is to say, the issue tracing through males throughout—have come to an end at the death of the last Lord Nairne, William the sixth Lord Nairne, and therefore the substituted limitation comes into force, "failing heirs male to the eldest daughter or heir "female to be procreated between them"—that is to say, between Margaret Nairne and Lord William Murray.

Now, my Lords, undoubtedly if this were an English case, or if this limitation had occurred in an English Deed, the interpretation of it would be very clear and distinct. We should have to go back on the extinction of the heirs male, and to take the eldest daughter or heir female to be procreated between the parents, and in this case the eldest daughter or heir female would have been the Hon. Margaret Nairne, who appears to have married Viscount Strathallan, and who, or some of whose issue, no doubt left issue, down whose line the descent would have had to be traced,—that, I say, would have been the case if the Deed had been an English Deed. But, my Lords, it appears that according to Scotch law, well established by certain cases to which I shall refer in a few moments, it is a clear rule that where you find these words in a Scotch Deed in a limitation of tailzie, "failing heirs male, to the "eldest daughter, or heir female," you are not to go to the eldest daughter of the parents, but you are to take the words "eldest "daughter" as explained by the words put in juxtaposition to them, namely, "heir female," and to read it as a limitation to the heir female in this sense, the heir female meaning the heir-at-law failing heirs male. In that way the heir female may come to be not a female at all, but a male the son of a female. That is exactly what has occurred in this case. The immediate ancestor of the Dowager Marchioness of Lansdowne through whom she connects herself with Margaret Nairne was Jean Mercer, who married George Keith Elphinstone, and who was the daughter of a son of a son of the original takers; so that the Claimant here is a female claiming through a grandson of the original parents in the tailzie.

My Lords, that this is clearly the law of Scotland appears not only from the institutional writers, but from two very remarkable cases which have been brought before your Lordships. The one is the Bargany case, where lands were limited by a marriage-contract to the heir male, and in default of him to the heirs female to be procreated of the marriage. The word "daughter" did not occur there—there were simply the words "to the heirs female," and it was held in that case that the appellation of heirs female, being a known legal term denoting heirs-at-law after the failure of the lineal male issue, must be understood so as to prefer the daughter of a son of the marriage to the eldest immediate daughter, because the eldest immediate daughter is not in such case the heir-at-law.

But, my Lords, a still more remarkable case, which appears to be exactly coincident with the present case, is that which is termed the *Kinfauns case* (the accurate name of it is *Lyon* v. *Blair*), decided in the year 1739. It appears by the papers which are in Lord Elchie's collection that in that case there was a contract of marriage between Alexander Carnegie, son of the Earl of Northesk, and Anna Blair, daughter of William Blair of Kinfauns. William Blair of Kinfauns resigned his lands and baronies of Kinfauns and Garsappie for new infeftment under clauses of entail to a substitution in these words: "in favour and for new infeftment of "the same to be made and granted to the said Anna Blair and "Alexander Carnegie, her affidate spouse the longer liver of them "two in liferent and to the said Anna Blair, her heirs male, to be "procreated betwixt her and her said affidate spouse, which failing "to the eldest daughter or heir female to be procreated between "them successive without division," words which are as nearly as possible the same as the words before your Lordships.

What happened was this: Of the marriage between these spouses, there were born a son and a daughter. The son succeeded to the estate, and died leaving a daughter Margaret. This daughter became Mrs. Lyon, and had a son named Alexander Lyon, who took the name of Blair. On the death of the immediate son of the marriage, his daughter Margaret Blair took possession of the estate, but Alexander Lyon brought an action, in which the question debated was whether his mother was not entitled to succeed to the estate under the destination to the "eldest "daughter and heir female," she being the actual daughter of the

marriage. "The defence consisted in maintaining that Margaret "Blair was 'eldest daughter and heir female' of the marriage, "and consequently heir of tailzie. If the words 'eldest daughter' "had not been used no doubt could have arisen, for the case "would then have been directly *in terminis* of that of Bargany," which was the first case I referred to, "but the use of the word "'daughter' gave rise to the argument that by it must have "been intended the immediate descendant of the marriage, and "various arguments were drawn to support this interpretation "from the general nature of the settlement. But it was successfully "answered that, although the word 'daughter' were to be con- "sidered of a doubtful and flexible nature, all this had been re- "moved by the use of the words 'heir female,' this term showing "clearly what the parties meant, it being possible that an heir "female might be a daughter, but altogether impossible that a "daughter of the entailer could, accurately speaking, be termed "an heir female when there existed the daughter of the en- "tailer's eldest son. Margaret Blair was accordingly preferred "as the heir female, the technical meaning of the word being "applied and held to control the other word used." In point of fact the way in which the Court read the words was this; daughter —*id est*, heirs female—using the second member of the sentence, as it frequently is used, to interpret the first.

It appears that this decision in the Kinfauns case has never been questioned, but it has frequently been recognized. In the case of Lady Essex Ker *v.* Innes Ker in 1810, President Blair said: "As to the estate of Kinfauns, the estate was destined by "a contract of marriage to the heirs male of the marriage, whom "failing to the eldest daughter or heir female to be procreated "betwixt them successive without division. Where could there "be a doubt but that by this destination the heir female of the "marriage was called whether a daughter or not? The compe- "tition was betwixt a daughter of the marriage and a daughter "of the eldest son of the marriage. The latter was clearly the "heir female and entitled to succeed."

My Lords, in addition to those two very remarkable cases which I have mentioned, all the institutional writers on the Scotch law appear to agree in saying that that is undoubtedly the law of Scotland at the present time. That being so, the difficulty which

presented itself, certainly to my mind, and, I think, to the minds of some of your Lordships, when this case was first opened, has been entirely removed. Your Lordships have to deal with this, not as an English case, but as a Scotch case to be governed by Scotch law, and according to that law it appears to be perfectly clear that the daughter of the marriage and her issue, if there were issue, inasmuch as they would not be heirs general, could not maintain their claim in competition with the claim of the present Claimant the Dowager Lady Lansdowne.

I therefore move, your Lordships, that the claim of the Dowager Marchioness of Lansdowne has been made out.

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C. F. Allen 8/2

1/29/12

LONDON:
PRINTED BY C. F. ROWORTH, BREAM'S BUILDINGS, CHANCERY LANE.